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Letter dated 18 May 2012 from the Permanent Representative of Portugal to the United Nations addressed to the President of the Security Council

I have the honour to transmit herewith the report of the workshop that the Permanent Mission of Portugal organized, with the Office for the Coordination of Humanitarian Affairs, on accountability and fact-finding mechanisms for violations of international humanitarian law and human rights law: the role of the Security Council — past and future, in November 2011 (see annex). The report is a summary of the excellent presentations, discussions and key recommendations of the workshop, and we would like to share them with Council members. We hope that colleagues will find them useful for our discussions in the Council.

I should be grateful if you would have the present letter and its annex circulated as a document of the Security Council.

(*Signed*) José Filipe **Moraes Cabral**
Ambassador

12-35537 (E) 020712

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Annex to the letter dated 18 May 2012 from the Permanent Representative of Portugal to the United Nations addressed to the President of the Security Council

Report of the workshop on accountability and fact-finding mechanisms for violations of international humanitarian law and human rights law: the role of the Security Council — past and future

New York, 1 November 2011

Organized jointly by the Permanent Mission of Portugal to the United Nations and the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat

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Abbreviations

CDF	Civil Defence Forces (Sierra Leone)
CRPC	Commission on Real Property Claims of Refugees and Displaced Persons in Bosnia and Herzegovina
ECOWAS	Economic Community of West African States
EECC	Eritrea-Ethiopia Claims Commission
G-77	Group of 77
HPD/CC	Housing and Property Directorate; Housing and Property Claims Commission
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994; International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; International Tribunal for the Former Yugoslavia
IHL	International humanitarian law
IPI	International Peace Institute
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
SCSL	Special Court for Sierra Leone
TESEV	Turkish Economic and Social Studies Foundation
UNCC	United Nations Compensation Commission
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNTAET	United Nations Transitional Administration in East Timor
UN-Women	United Nations Entity for Gender Equality and the Empowerment of Women

Foreword

In his 2009 and 2010 reports to the Security Council on the protection of civilians in armed conflict, the Secretary-General identified five core challenges to ensuring better protection for civilians in such situations: enhancing compliance by parties to the conflict with international law; enhancing compliance by non-State armed groups; enhancing protection by United Nations peacekeeping and other relevant missions; enhancing humanitarian access; and enhancing accountability for violations.

The present report results from a workshop which focused on the last of those challenges: enhancing accountability for violations of international humanitarian law and human rights law, both for individual perpetrators and for parties to the conflict. As the Secretary-General noted, in many conflicts, it is to a large degree the absence of accountability and, worse still, the lack in many instances of any expectation thereof, that allows violations to thrive.

The Security Council's role is central to progress. It has already set significant precedents by requesting the establishment of fact-finding mechanisms to investigate alleged violations, providing reparations for victims and promoting individual criminal responsibility.

To inform the open debate on the protection of civilians in armed conflict, on 9 November 2011, during the Portuguese Presidency of the Council, the Permanent Mission of Portugal and the Office for the Coordination of Humanitarian Affairs co-hosted a workshop on the Council's role in enhancing accountability. The workshop brought together over 100 representatives, including those of States Members of the United Nations, civil society and academia.

The workshop was structured around three key aspects of accountability: individual criminal responsibility, fact-finding mechanisms and reparations. In relation to each of those three issues, participants reviewed past Council practice as well as relevant national and international experience and reflected on the possible future role of the Council. This report is a summary of the presentations, discussions and key recommendations of the workshop.[1]

Much more can and should be done to ensure more effective and consistent accountability. We therefore hope that States and other relevant actors will find useful the issues discussed and the recommendations put forward in this workshop.

(*Signed*) Valerie **Amos**
Under-Secretary-General for Humanitarian Affairs
and Emergency Relief Coordinator

(*Signed*) José Filipe **Moraes Cabral**
Ambassador
Permanent Representative of Portugal to the United Nations

[1] Highlights from the workshop were presented in a paper published on 9 November 2011 by the Permanent Mission of Portugal to the United Nations and the Office for the Coordination of Humanitarian Affairs. Available from http://ochanet.unocha.org/p/Documents/Accountability%20Workshop%201%20Nov%202011%20Highlights.pdf.

Welcome and introduction

Following the welcome by Warren Hoge, the Senior Advisor for External Relations of the International Peace Institute, José Filipe Moraes Cabral, Permanent Representative of Portugal to the United Nations and Valerie Amos, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, made opening statements.

Statement by Ambassador Cabral

Ambassador Cabral welcomed participants and noted that the workshop was being held on the first day of the Portuguese Presidency of the Security Council. He referred to Security Council resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflict, which underline that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past violations and prevent their recurrence. Both resolutions emphasize the responsibility of States to investigate and prosecute those suspected of genocide, crimes against humanity and war crimes or other serious violations of international human rights law.

The Ambassador noted that the Council also has an important role to play in promoting accountability for such crimes and other violations of international humanitarian law and human rights law. The Council, in many decisions regarding situations on its agenda, has called for accountability and the end of impunity for crimes committed in times of conflict and political violence. The Ambassador reiterated that the failure to ensure accountability, provide reparation and enable reconciliation can hamper peace processes and post-conflict stability, creating new threats to peace and security. He put forward key questions to guide the discussion on the role of the Council in ensuring accountability, including the following: what lessons can be learned, and what good practices identified, from the Council's efforts to ensure criminal responsibility? What are the challenges that confront the various fact-finding mechanisms? How can reparations be given greater prominence in the achievement of accountability? What additional steps might the Council take to ensure accountability for violations in armed conflict?

Statement by the Under-Secretary-General

The Under-Secretary-General began her statement by reflecting that in conflicts throughout the world, accountability for those who commit often horrific violations of humanitarian law and human rights is the exception rather than the rule. She called for greater progress at the national level by States to ensure accountability and deter further violations. She outlined practical steps States could take in this regard, including by the adoption of national legislation for the prosecution of persons suspected of genocide, crimes against humanity, war crimes and other serious violations of human rights law. She also mentioned the importance, for States that have not yet done so, of ratifying the Rome Statute and cooperating with the International Criminal Court and similar mechanisms.

The Under-Secretary-General emphasized the need to punish those who have violated the law, as well as seek justice and redress for victims. She highlighted the importance of the range of possible justice and reconciliation mechanisms, such as national, international and "mixed" criminal courts and tribunals, truth and

reconciliation commissions for victims, and institutional reforms, to which the Council drew attention in its resolution 1894 (2009). She also noted important precedents set by the Council, notably the establishment of commissions of inquiry on Bosnia, Rwanda and Darfur, which paved the way for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and the Council's referral of the situation in Darfur to the International Criminal Court.

She also drew attention to an area of accountability that is frequently overlooked — the responsibility of parties to the conflict to make reparations for violations of international humanitarian law and human rights law. She noted the wealth of practice that can be garnered from Council action and national practice in the area of reparations initiatives. Finally, the Under-Secretary-General referred to important decisions with regard to the recipients of reparations, not just for individuals but also for affected communities, and called for better promotion and support of such efforts in the future.

Ms. Kyung-wha Kang, Deputy United Nations High Commissioner for Human Rights, and Ms. Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, also made opening remarks.

Statement by the Deputy United Nations High Commissioner for Human Rights

The Deputy United Nations High Commissioner highlighted the duty of States to investigate and prosecute persons responsible for gross violations of international human rights law and international humanitarian law. States should cooperate with each other and assist international judicial organs competent in the investigation and prosecution of such violations. She noted that when States failed to meet these duties, the international community collectively bore responsibility to ensure accountability. The Deputy United Nations High Commissioner emphasized that accountability for violations is not only a requirement to meet international legal obligations; it is key to prevention, protection, sustainable peace and non-recurrence of violence. She called for greater support to the victims of violations through reparations, and noted that the Council had an important role to play in that regard. In that respect, she highlighted that the Council had recognized serious violations of human rights and international humanitarian law as possible threats to peace and security in many situations. While welcoming the increased resort by the international community to commissions of inquiry and fact-finding mechanisms, she noted that it was crucial to ensure follow-up to their recommendations. She emphasized the important fact-finding role played by the special procedures mechanisms of the Human Rights Council. Finally, she noted the important strides made by the international criminal justice system towards ensuring accountability and ending impunity. She referred to the Security Council's role in establishing ad hoc and hybrid tribunals and to its referral of the situations in Darfur and Libya to the International Criminal Court.

Statement by the Deputy Prosecutor of the International Criminal Court

Deputy Prosecutor Bensouda focused her remarks on the role and impact of the International Criminal Court in reinforcing the investigation and prosecution of serious crimes of concern to the international community. She presented the Court's mission to help end impunity for perpetrators of the most serious crimes of concern to the international community — genocide, crimes against humanity and war

crimes — and thus, to contribute to the prevention of such crimes. She highlighted the Court's positive influence on the behaviour of States and political leaders. She also noted its impact on the behaviour of other actors who have a role to play in ending impunity, in particular that national armed forces throughout the world were adjusting their operational standards. The Deputy Prosecutor also mentioned the impact of the Court on States not party to the Rome Statute, referring to the Lubanga case and its influence in shaping demobilization efforts in Sri Lanka and Nepal. Finally, she highlighted the impact of the Rome Statute on other institutions, including the Security Council.

Panel presentations and discussion

Panel 1: individual criminal responsibility

The panel started with a review of the positive and important precedents of Security Council action in the last 20 years in promoting individual criminal responsibility, including the establishment of ICTY and ICTR and the Council's referral of the situations in Darfur and Libya to ICC.

The discussions then turned to the relationship between the Security Council, a political body, and the ICC, a judicial body. Some areas of possible concern were flagged, including questions of consistency or selectivity as to which situations the Council referred to ICC; the exemptions for the nationals of certain States in the referrals to date; and the possibility for article 16 deferrals. Despite these possible problematic issues, there was a positive assessment of actual practice to date: political interference had been limited and, in particular, the Council had exercised judicious restraint from making article 16 deferrals, despite the endeavours of affected States to obtain them.

It was also pointed out that, because ICC lacks enforcement mechanisms, it was important for the Council to remain engaged in the situations it referred to the Court and to take measures to promote the cooperation of relevant parties with the Court. It was emphasized that this had to happen consistently to avoid perceptions of the Council's selectivity.

It was suggested that an indicative checklist could be drawn up to guide the Security Council's engagement with ICC at the time it was considering referrals and more generally. This could include:

- Reflections on when a situation constitutes a threat to international peace and security that warrants a referral to ICC
- Considerations of funding for cases referred to the Court by the Council
- Exemptions in the referrals
- The Council's role in promoting cooperation with the Court by relevant States

Such a checklist would not be prescriptive but, rather, enable a well-informed debate and promote consistency in Council practice.

With regard to hybrid tribunals, it was recalled that the Special Court for Sierra Leone was established by an agreement between the United Nations and Sierra Leone, pursuant to a Security Council request — another example of the Council's involvement in the establishment of criminal tribunals.

An important dimension of hybrid tribunals that emerged from the panel discussion, in addition to their role in bringing perpetrators of war crimes to justice, was how they could promote national ownership of the process and the positive impact and "legacy" such mechanisms could have on the affected communities more broadly. The panel reflected in particular on the experience of the Special Court for Sierra Leone and its impact on the national legal system, the involvement and ownership of the Sierra Leonean community in the proceedings and also the longer-lasting legacy of the tribunal on the people most affected by the crimes. Practical and positive examples of this legacy were noted, including the development of the capacity of national legal staff: 60 per cent of the Court staff was currently Sierra Leonean, including in senior positions; some employees had moved on to other positions in international tribunals, also at senior levels. Moreover, from a very practical point of view, as the Court's workload decreased, part of its premises were being used for the law faculty and its detention facilities to accommodate vulnerable detainees including juveniles and women serving sentences imposed by the "ordinary" criminal courts.

A number of participants highlighted the challenges of funding ICC proceedings and hybrid tribunals, both in terms of the need for resources but also with regard to the sensitivities surrounding the sources of funding. It was pointed out that although one possible way of addressing the issue was to resort to voluntary donations in multi-donor funds, this could have a negative impact on the actual or perceived independence of the judicial processes. Thought had to be given to ways in which the regular budget of the United Nations could contribute to the costs of ICC proceedings — particularly for those situations referred to ICC by the Council — as well as those of other tribunals.

The role of national courts and authorities was also discussed. It was recalled that the primary obligation to investigate and prosecute lay with national authorities and that international tribunals had a subsidiary role. Despite this, to date there had been only a small number of investigations and prosecutions at the national level.

In that context it was pointed out that, in addition to making a crucial contribution to the fight against immunity per se, the Council's establishment of the ad hoc tribunals also had a galvanizing effect at the national level: the existence and work of ICTY spurred the establishment of national war crimes courts in Bosnia and Herzegovina, Croatia and Serbia; and that of ICTR led to considerable pressure to reform the Rwandan justice system. Both had a catalytic effect on domestic prosecutions on the basis of universal jurisdiction in countries across the world.

It was recommended that the Security Council find ways of encouraging and, possibly, assisting, States to do more at the national level. It was suggested that the possible role of peacekeeping and political missions in supporting national authorities in this field also be considered.

There was also a call for more efforts to empower national authorities more broadly, and not just courts, and at all stages of the process, for example by helping States to adopt the necessary legislation to bring proceedings and in terms also of commencing prosecutions.

Finally, the session underlined the need to be open to the establishment of innovative mechanisms and to work towards the establishment of comprehensive and mutually reinforcing systems linking ICC, any possible future hybrid court and national bodies as well as criminal prosecutions and reparations programmes.

Panel 2: fact-finding mechanisms

The panel highlighted the breadth and variety of United Nations experience in this area and the value of such diversity. Fact-finding mechanisms have been established at the request of a number of different entities, including the Security Council, the Human Rights Council, the Secretary-General and Member States, and on the initiative of the United Nations High Commissioner for Human Rights. The increased resort to such mechanisms to ascertain disputed facts, apportion responsibility and make suggestions for pursuing accountability was noted.

The experiences of the various fact-finding mechanisms established by the Security Council in different contexts were discussed, starting with the positive experiences of commissions of experts that led to the establishment of ICTY and ICTR, as well as the International Commission of Inquiry on Darfur that led to the Council's referral of that situation to ICC. Conversely, the International Commission of Inquiry in Burundi, established by the Council in 1995, was referred to as an instance in which the Council had not maintained a sufficient degree of involvement and momentum and, consequently, after more than 15 years no progress had been made in holding accountable those responsible for the violence.

The fact-finding mechanisms established by the Secretary-General, including the Panel of Experts on Sri Lanka (June 2010) and the Panel of Inquiry on the flotilla incident of 31 May 2010 (August 2010) as well as various commissions of inquiry established by the Human Rights Council since the early 1990s were also reviewed.

The discussions highlighted a number of the challenges fact-finding bodies face, in particular regarding questions of selectivity as to what contexts are considered and the need for greater consistency in their establishment and mandates. The need to link fact-finding bodies with judicial processes to ensure they inform each other was emphasized. In situations where fact-finding investigations are conducted in parallel with other national and international judicial or investigative processes, it is important to ensure they do not hamper these other processes but, to the extent possible, assist them. In Burundi, for example, the Commission of Inquiry took efforts to conform its fact-finding activities to judicial standards to collect evidence in a manner that would allow it to be used in any future judicial proceedings.

The panel also considered the numerous methodological and operational issues raised by the work of fact-finding bodies. A number of factors that contributed to their success were noted, including:

- The need for clear mandates
- Ensuring that the time frames established for carrying out the investigation and reporting back were commensurate with the complexity of the situation
- The need for the members of the body to have a wide range of expertise including legal (international humanitarian law, human rights, criminal justice, victim protection), military, forensic and ballistic — to name but a few
- The need for adequate funding
- Access and the cooperation of the relevant authorities
- Ensuring the protection of witnesses, victims and other sources of information

Another element that emerged from the discussions was the importance of the timing of the establishment of these mechanisms. Their work should take place sufficiently early in a crisis to enable them to contribute to the prevention of further violations rather than just investigate those already committed.

Participants also emphasized the need for more consistent follow-up to the recommendations of fact-finding mechanisms to ensure their effectiveness and credibility and to meet the expectations their establishment raises, especially among victims.

Turning to the possible role of the Security Council, it was suggested that it should be more systematically apprised of the reports of the non-Council mandated commissions/missions which had investigated countries on its agenda. The information on a particular context they presented and their findings could be a useful complement to the information already at the Council's disposal. Examples of recent Security Council practice were noted, including its reference in a resolution to the report and findings of the International Commission of Inquiry on Côte d'Ivoire mandated by the Human Rights Council.[2]

The Security Council's possible role in reinforcing and supporting the work of non-Council mandated fact-finding mechanisms by requesting States and other relevant actors to cooperate during the investigation and, crucially, in the implementation of recommendations was also highlighted.

Panel 3: reparations

The third and final panel was based on the premise that while individual criminal responsibility brings those accused of violations to justice and may have a deterrent effect, in the vast majority of cases, it does not provide redress to the victims of violations. The panel stressed the need for a greater focus on supporting victims and their communities through reparations. There was broad consensus among the participants that this is an area of accountability that is all too frequently overlooked, despite the wealth and diversity of experience at international and national levels, both in terms of types of reparations awarded and of recipients. A first suggestion was the collection and exchange of expertise and best practices in the area of reparations.

Panellists reflected on lessons learned from various international and national reparation schemes, starting with the Security Council's role in establishing the United Nations Compensation Commission for the compensation of losses arising as a direct result of the invasion and occupation of Kuwait by Iraq, including many that were violations of international humanitarian law and human rights law. The work of the Eritrea-Ethiopia Claims Commission was presented, and reference was also made to national reparations schemes, such as the Colombian model of transitional justice and the Truth, Justice and Reconciliation Commission in Kenya.

The panel also highlighted the expansive approach to reparations adopted by the International Criminal Court system, which aims to provide reparations to as wide a group of affected people and communities as possible, both by means of the awards of reparations in individual prosecutions and through the Trust Fund for Victims.

[2] Resolution 2000 (2011).

It was noted that frequently reparations are thought of too narrowly, exclusively in terms of financial compensation. Participants emphasized the broad range of other possible forms of reparations including restitution and rehabilitation. The practice of the Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovina) and the Housing and Property Claims Commission (Kosovo) were presented as innovative schemes addressing disputes to title to property in the aftermath of conflict. The importance of coordination with enforcement bodies and other national authorities from the outset of the work of such mechanisms, the development of national legal frameworks and enhancing the capacity of judicial and law enforcement systems were underlined.

In terms of recipients of reparations, the discussion highlighted the need to look beyond individual victims and the importance of also considering affected communities.

Turning to the Security Council's role in reparations, it was noted that on a number of occasions the Council had been encouraged to adopt measures in relation to this aspect of accountability. For example, in addition to recommending the referral of the situation to ICC, the International Commission of Inquiry on Darfur also recommended that the Council establish an international compensation commission — a suggestion that received little attention and no Council follow-up.

This being said, a number of interventions pointed out the possible role of the Council in this area, which could go beyond the establishment of international reparations programmes to the authorization of the use of assets frozen under sanctions regimes to make reparations as well as the possible support of national reparations programmes.

It was pointed out that a clear link existed between the maintenance of international peace and security and certain forms of reparations, most notably those related to real property. Frequently, disputes to title and access to land and real property are at the root of tensions and conflict and, if not properly addressed, can give rise to new cycles of violence. The example of the Council's calling upon the peacekeeping mission in Côte d'Ivoire and United Nations agencies to support the host State in addressing land tenure issues was raised.

The need to consider the possible role of peacekeeping and other missions in supporting host States in establishing reparations mechanisms in other contexts was highlighted.

Recommendations

The workshop identified a number of areas that merit further attention and some key recommendations with respect to the future role of the Security Council in enhancing accountability for violations of international humanitarian and human rights law, including the following:

Individual criminal responsibility

- An indicative checklist could be drawn up to guide the Security Council's engagement with ICC at the time it was considering referrals and more generally. This could include:

- Reflections on when a situation constitutes a threat to international peace and security that warrants a referral to ICC
- Considerations of funding for cases referred to the Court by the Council
- Exemptions in the referrals
- The Council's role in promoting cooperation with the Court by relevant States

- As ICC lacks enforcement mechanisms, it was important for the Council to remain engaged in the situations it referred to the Court and to take measures to promote the cooperation of relevant parties with the Court. This had to happen consistently to avoid perceptions of the Council's selectivity.
- Thought should be given to ways in which the United Nations regular budget could contribute to the costs of ICC proceedings, particularly those referred by the Council, as well as those of other tribunals.
- The Council should find ways of encouraging and, possibly, assisting States to do more at the national level. The possible role of peacekeeping and political missions in supporting national authorities in this field should also be considered.
- Innovative ways of establishing comprehensive and mutually reinforcing systems linking ICC, any possible future hybrid court and national bodies as well as criminal prosecutions and reparations programmes should be considered.

Fact-finding mechanisms

- There is a need for greater consistency in the establishment and mandates of fact-finding mechanisms.
- When establishing fact-finding mechanisms consideration should be given to a number of issues, including:
  - The need for clear mandates
  - Ensuring that the time frames established for carrying out the investigation and reporting back are commensurate with the complexity of the situation
  - The need for the members of the body to have a wide range of expertise including legal (international humanitarian law, human rights, criminal justice, victim protection), military, forensic and ballistic — to name but a few
  - The need for adequate funding
  - Access and the cooperation of the relevant authorities
  - Ensuring the protection of witnesses, victims and other sources of information
- Fact-finding mechanisms should be established sufficiently early in a crisis to enable them to contribute to the prevention of further violations.
- There is a need for more consistent follow-up to the findings and recommendations of fact-finding mechanisms to ensure their effectiveness and

credibility and to meet the expectations their establishment raises, especially among victims.

- The Security Council should be more systematically apprised of the reports of the non-Council mandated bodies which have investigated countries on the Council's agenda.

Reparations

- Reparations are an area of accountability that is all too frequently overlooked, despite a number of important and varied precedents at the international and national levels, both in terms of types of reparations awarded and of recipients. Best practice and expertise in this area should be collected and exchanged.
- Reparations are frequently thought of too narrowly, exclusively in terms of financial compensation. The broad range of other possible forms of reparations, including restitution and rehabilitation, should also be borne in mind. Similarly, in terms of recipients of reparations, it was important to look beyond individual victims and also consider affected communities.
- Consideration should be given to the widest possible role of the Council in this area, which could go beyond the establishment of international reparations programmes to the authorization of the use of assets frozen under sanctions regimes to make reparations as well as the possible support of national reparations programmes.
- The possible role of peacekeeping and other missions in supporting host States in establishing reparations mechanisms in other contexts should also be considered.

Enclosure I

Agenda of the workshop

8.30 a.m.	Registration and breakfast
8.45-9.30 a.m.	Welcome and introduction
	Welcoming remarks
	Mr. Warren **Hoge**, Senior Adviser for External Relations, International Peace Institute
	Opening statements
	Ambassador José Filipe **Moraes Cabral**, Permanent Representative of Portugal to the United Nations
	Ms. Valerie **Amos**, Under-Secretary-General and Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs
	Ms. Kyung-wha **Kang**, Deputy United Nations High Commissioner for Human Rights
	Ms. Fatou **Bensouda**, Deputy Prosecutor of the International Criminal Court
9.30-11.00 a.m.	Individual criminal responsibility
	What are the key challenges related to prosecutions? What are the relative advantages and disadvantages of national and international mechanisms? How can States' compliance with their obligations to investigate and prosecute be enhanced? What lessons can be learned from existing international/hybrid mechanisms? What is the possible future role of the Security Council in relation to prosecutions?
	Moderator: Ambassador Christian **Wenaweser**, Permanent Representative of Liechtenstein to the United Nations
	Security Council practice
	Mr. Richard **Dicker**, Director of the International Justice Programme, Human Rights Watch
	Non-Security Council practice
	Ms. Simone **Monasebian**, Chief, New York Office, United Nations Office on Drugs and Crime; former Principal Defender, Special Court for Sierra Leone
	Mr. Robert **Young**, Deputy Permanent Observer of the International Committee of the Red Cross to the United Nations
	Discussion: possible future Security Council role
11.00-11.15 a.m.	Coffee break

11.15 a.m.-12.45 p.m.	Fact-finding mechanisms
	What are the challenges and advantages of the various different types of fact-finding mechanisms? To what extent have selectivity, one-sidedness of mandate and lack of clarity of follow-up been problematic? Could a permanent mechanism be established? What is the possible future role of the Security Council in relation to prosecutions?
	Moderator: Ambassador Sylvie **Lucas**, Permanent Representative of Luxembourg to the United Nations
	Security Council practice
	Mr. Erwin **van der Borght**, Africa Program Director, Amnesty International
	Non-Security Council practice
	Ms. Francesca **Marotta**, Chief, Methodology, Education and Training Section, Office of the United Nations High Commissioner for Human Rights
	Discussion: possible future Security Council role
12.45-1.15 p.m.	Lunch
1.15-2.45 p.m.	Reparations
	How can the reparations dimension of accountability be given greater prominence? What have been the key challenges, lessons learned and good practices of international and national reparation mechanisms? What is the possible future role of the Security Council in relation to reparations?
	Moderator: Ambassador Mansour Ayyad SH A **Alotaibi**, Permanent Representative of Kuwait to the United Nations
	Security Council practice
	Mr. Romesh **Weeramantry**, University of Hong Kong; formerly Legal Adviser, United Nations Compensation Commission
	Non-Security Council practice
	Mr. Julien **Piacibello**, Humanitarian Affairs Officer, Office for the Coordination of Humanitarian Affairs
	Ms. Fatou **Bensouda**, Deputy Prosecutor of the International Criminal Court
	Discussion: possible future Security Council role

2.45-3.30 p.m.	Closing remarks: possible future role for the Security Council
	Ambassador José Filipe **Moraes Cabral**, Permanent Representative of Portugal to the United Nations
	Ms. Valerie **Amos**, Under-Secretary-General and Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs

Enclosure II

Participants

Ms. Olga **Abilova**
Permanent Mission of Norway to the United Nations

Ms. Dina **Abou Samra**
Office for the Coordination of Humanitarian Affairs

Dr. Mireille **Affa'a-Mindzie**
International Peace Institute

Ms. Beatrice T. **Agyarkoh**
International Peace Institute

Ms. Stephanie **Alfaro**
Columbia University

Ms. Aysha Ahmed Saquer **Alkhalifa**
Permanent Mission of Bahrain to the United Nations

Mr. Abdullah M. **Alsaidi**
International Peace Institute

Ms. Letitia **Anderson**
United Nations Action against Sexual Violence in Conflict

Ms. Jane **Anttila**
Permanent Mission of Finland to the United Nations

Mr. Richard **Bennett**
Office of the United Nations High Commissioner for Human Rights

Ms. Wasantha **Bandarage**
Office of the Special Adviser on Africa

Ms. Dutima **Bhagwandin**
Office of the United Nations High Commissioner for Human Rights

Ms. Mónica **Bolaños**
Permanent Mission of Guatemala to the United Nations

Ms. Karoline **Boullay**
Permanent Mission of Germany to the United Nations

Mr. José Alberto **Briz Gutiérrez**
Permanent Mission of Guatemala to the United Nations

Mr. Benjamin **Cabouat**
Permanent Mission of France to the United Nations

Ms. Anastasia **Carayanides**
Permanent Mission of Australia to the United Nations

Mr. Tonderai **Chikuhwa**
Office of the Special Representative of the Secretary-General on sexual violence in conflict

Mr. Cristian **Correa**
International Center for Transitional Justice

Ms. Gabriele **De Gaudenzi**
United Nations Children's Fund

Mr. Sumith de **Silva**
Consortium of Sri Lanka Expatriates

Ms. Véronique **Dockendo**
Permanent Mission of Luxembourg to the United Nations

Mr. Joseph Cornelius **Donnelly**
Caritas Internationalis

Mr. Swen **Dornig**
Permanent Mission of Liechtenstein to the United Nations

Mr. Christophe **Eick**
Permanent Mission of Germany to the United Nations

Ms. Anne-Christine **Eriksson**
Office of the United Nations High Commissioner for Refugees

Ms. Astrid Forberg **Ryan**
Security Council Report

Ms. Emanuela-Chiara **Gillard**
Office for the Coordination of Humanitarian Affairs

Ms. Anne Marie **Goetz**
United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women)

Mr. Thomas **Guerber**
Permanent Mission of Switzerland to the United Nations

Ms. Kirsten **Hagon**
Oxfam International

Ms. Mona **Hammoud**
Permanent Mission of Lebanon to the United Nations

Mr. Adrian **Hauri**
Permanent Mission of Switzerland to the United Nations

Ms. **He** Fen
Permanent Mission of China to the United Nations

Ms. Gloria **Herndon**
G. B. Herndon and Associates

Mr. John L. **Hirsch**
International Peace Institute

Mr. Andrew **Hudson**
Crisis Action

Mr. Johnny **Ibrahim**
Permanent Mission of Lebanon to the United Nations

Mr. Balkees **Jarrah**
Human Rights Watch

Mr. Jean-Cédric **Janssens de Bisthoven**
Permanent Mission of Belgium to the United Nations

Mr. Vahid **Karimi**
Permanent Mission of the Islamic Republic of Iran to the United Nations

Ms. Mateya **Kelley**
International Humanitarian Fact-Finding Commission

Ms. Golzar **Kheiltash**
Making Amends Campaign of the Campaign for Innocent Victims in Conflict

Ms. Rebecca **Kinyon**
Permanent Mission of the United States of America to the United Nations

Ms. Sanja **Kuljanin**
Permanent Mission of Bosnia and Herzegovina to the United Nations

Mr. Hui-Ting **Kuo**
Permanent Mission of Palau to the United Nations

Mr. Jérémie **Labbé**
International Peace Institute

Mr. Yahav **Lichner**
Permanent Mission of Israel to the United Nations

Mr. Damian **Lilly**
Office for the Coordination of Humanitarian Affairs

Mr. Andreas **Løvold**
Permanent Mission of Norway to the United Nations

Mr. Grigory **Lukiyantsev**
Permanent Mission of the Russian Federation to the United Nations

Dr. Adam **Lupel**
International Peace Institute

Mr. João Miguel **Madureira**
Permanent Mission of Portugal to the United Nations

Mr. Zaved **Mahmood**
Office of the United Nations High Commissioner for Human Rights

Mr. Mlungisi **Mbalati**
Permanent Mission of South Africa to the United Nations

Ms. Amand **McGee**
League for Educational Awareness of the Holocaust

Ms. Elzbieta **Mikos-Skuza**
International Humanitarian Fact-Finding Commission

Ms. Naomi **Miyashita**
Office of the Special Representative of the Secretary-General for children and armed conflict

Ms. Karen **Mosoti**
International Criminal Court

Mr. Will **Nankervis**
Permanent Mission of Australia to the United Nations

Mr. Miloš **Nikolić**
Permanent Mission of Montenegro to the United Nations

Mr. Tonje **Nordengen**
Royal Norwegian Consulate General

Mr. Paul **Oertly**
Office of the United Nations High Commissioner for Human Rights

Ms. Annette Andrée **Onanga**
Permanent Mission of Gabon to the United Nations

Ms. Marie **O'Reilly**
International Peace Institute

Mr. Till **Papenfuss**
International Peace Institute

Mr. Harpeet **Paul**
Amnesty International

Mr. Renzo **Pomi**
Amnesty International

Mr. Juan J. **Quintana**
Permanent Mission of Colombia to the United Nations

Ms. Caitlin **Reiger**
International Center for Transitional Justice

Mr. Stéphane **Rey**
Permanent Mission of Switzerland to the United Nations

Ms. Ana Cristina **Rodriguez**
Permanent Mission of Guatemala to the United Nations

Mr. Gert **Rosenthal**
Permanent Mission of Guatemala to the United Nations

Mr. Nazih **Sanjakdar**
Permanent Mission of Lebanon to the United Nations

Ms. Ady **Schonmann**
Permanent Mission of Israel to the United Nations

Mr. Ralf **Schroeer**
Permanent Mission of Germany to the United Nations

Ms. Kaoruko **Seki**
Office for the Coordination of Humanitarian Affairs

Mr. Edric **Selous**
Executive Office of the Secretary-General

Ms. Nadia **Siddiqui**
International Center for Transitional Justice

Ms. Param-Preet **Singh**
Human Rights Watch

Mr. Nikolas **Stuerchler**
Permanent Mission of Switzerland to the United Nations

Ms. Brigitte **Tawk**
Permanent Mission of Lebanon to the United Nations

Ms. Sarah **Taylor**
NGO Working Group on Women, Peace and Security

Ms. Julia **Thallinger**
Permanent Mission of Austria to the United Nations

Mr. Peter **Thomson**
Government of Australia, Asia Pacific Civil-Military Centre of Excellence, Canberra

Ms. Anthony **Triolo**
International Center for Transitional Justice

Ms. Pollyanna **Truscott**
Amnesty International

Mr. Evgeny **Ustinov**
Permanent Mission of the Russian Federation to the United Nations

Mr. Pim **Valdre**
International Peace Institute

Ms. Nahla **Valji**
UN-Women

Mr. Andras **Vamos-Goldman**
Justice Rapid Response

Mr. João Augusto Costa **Vargas**
Permanent Mission of Brazil to the United Nations

Ms. Susana **Vaz Patto**
Permanent Mission of Portugal to the United Nations

Ms. Chantale **Walker**
Permanent Mission of Canada to the United Nations

Ms. Joanna **Weschler**
Security Council Report

Ms. Surendrini **Wijeyaratne**
Oxfam International

Ms. Galit **Wolfensohn**
United Nations Children's Fund

Ms. Ann **Wright**
International Peace Institute

Ms. Haruka **Yamazaki**
Permanent Mission of Japan to the United Nations

Ms. Kristele **Younes**
Campaign for Innocent Victims in Conflict

Mr. Robert **Zuber**
Global Action to Prevent War

Enclosure III

Opening statements and panel presentations

Opening statement by José Filipe Moraes Cabral, Permanent Representative of Portugal to the United Nations

I would like to welcome you to this workshop on the very first day of the Portuguese presidency of the Security Council, a workshop that we are co-organizing with the Office for the Coordination of Humanitarian Affairs and — allow me to underline that — we value this partnership very much. We are here today to discuss the role of the Council in promoting accountability for violations of international humanitarian law and human rights law. Allow me also to pay tribute to Judge Antonio Cassese who passed away recently and who during his long and distinguished career made a major contribution to fighting impunity and promoting accountability.

As the Secretary-General stated in one of his most recent reports on protection of civilians in armed conflict, in many conflicts, it is to a large degree the absence of accountability and, worse still, the lack in many instances of any expectation thereof that allows violations to thrive.

Security Council resolutions 1674 (2006) and 1894 (2009) on the protection of civilians state that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past violations and prevent their recurrence, and that it is the responsibility of States to comply with their obligations to investigate and prosecute persons suspected of war crimes, crimes against humanity, genocide or other serious violations of international humanitarian law.

Both resolutions rightly emphasize the responsibility of States to prosecute those suspected of genocide, crimes against humanity and war crimes, but the Security Council too has an important role to play in promoting accountability for such crimes and other violations of international humanitarian law and human rights law.

In many decisions — some of them very recent — regarding situations on its agenda, the Council has called for accountability and the end of impunity for crimes committed in times of conflict and political violence. It is clear that the failure to ensure accountability, provide reparation and enable reconciliation can hamper a peace process and a post-conflict situation, creating therefore a new threat to peace and security. Recent indictments and prosecutions by ICC and by mixed and national Courts demonstrate, however, that accountability is not beyond our reach.

We would like to have today an informed and thoughtful discussion about the role of the Security Council in this regard. This workshop is indeed an attempt to review the past practice of the Council in terms of ensuring individual criminal responsibility, promoting fact-finding mechanisms, and reparations. We will also try to learn from the experience of other United Nations and non-United Nations entities in these three areas. And hopefully we will be learning from past practice, to identify recommendations for future Security Council practice such as the following:

- What lessons can be learned, and good practices identified, from the Council's efforts to ensure individual criminal responsibility?

- What are the challenges that confront the various fact-finding mechanisms?
- How can reparations be given greater prominence in the achievement of accountability?
- What additional steps might the Council take to ensure accountability for violations in armed conflict?

As you have seen in the programme, our discussions will be divided into three sessions — individual criminal responsibility, fact-finding mechanisms and reparations — which will consist of a presentation on Security Council practice and one or more presentations on other relevant international or national practice. The presentations will be followed by 45 to 50 minutes of open discussion.

I express my deepest appreciation to the Deputy United Nations High Commissioner for Human Rights for coming from Geneva and to the Deputy Prosecutor of the International Criminal Court for coming from The Hague especially for this workshop. We are very honoured by your presence.

A special thanks also to Richard Dicker, Simone Monasebian, Robert Young, Erwin van der Borght, Francesca Marotta and Romesh Weeramantry for agreeing to give a presentation; and to my colleagues the permanent representatives of Kuwait, Liechtenstein and Luxembourg, my deepest thanks for accepting the invitation to moderate this workshop. It is an impressive list of speakers and moderators.

I hope that our discussions will be fruitful. Your interventions are essential to achieving this; I also hope that today's discussion will be a good preparation and give us a platform to build on for the open debate of the Security Council on the protection of civilians in armed conflict that will take place on 9 November 2011.

I would also like to underline that we will prepare a compilation of the ideas that come out of this discussion and will reflect them in my closing remarks to the open debate. It would be in our view another contribution of the wider membership and civil society to the debates of the Council on this important issue.

Opening statement by Ms. Valerie Amos, Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs

Thank you to the Portuguese mission and the International Peace Institute for co-hosting this seminar.

I am very pleased to welcome you to this workshop on the Security Council's role in enhancing accountability for violations of international law in armed conflict.

It comes not a moment too soon. In conflicts throughout the world, holding accountable those who commit often horrific violations of humanitarian law and human rights — and offering some semblance of justice and redress for their victims — is the exception rather than the rule. It is time we reversed this state of affairs.

We have seen positive and important developments in ensuring individual criminal responsibility for war crimes, crimes against humanity and genocide. The international tribunals for the former Yugoslavia and Rwanda; the International Criminal Court; and the internationally supported special courts in Sierra Leone and Cambodia have all been instrumental in sending a very clear message to actual and

would-be perpetrators that their crimes have consequences, even long after the conflict has ended.

Nevertheless, we need to see greater progress at the national level by States to ensure accountability and deter further violations. Security Council resolution 1894 (2009) makes it clear that accountability for serious crimes must be ensured by taking measures at the national level and, importantly, by enhancing international cooperation in support of national mechanisms.

In practical terms that means adopting national legislation for the prosecution of persons suspected of committing genocide, crimes against humanity, war crimes and other serious violations of human rights law. It means searching for and, on the basis of universal jurisdiction, prosecuting persons suspected of grave breaches of international humanitarian law and serious violations of human rights law, or extraditing them. And for those States that have not yet done so, it means ratifying the Rome Statute and cooperating fully with ICC and similar mechanisms.

Of course, accountability is not only about ensuring individual criminal responsibility for violations. It is also about punishing those who have violated the law; seeking justice and redress for victims; preventing violations from being repeated by fostering a change in law and policy; and ensuring lasting peace and stability by making sure that victims have some semblance of justice for the wrongs they have suffered. Crucially, after a conflict, accountability is about helping a country/a society come to terms with itself, to help communities to move forward.

That is why the range of possible justice and reconciliation mechanisms including national, international and "mixed" criminal courts and tribunals/truth and reconciliation commissions/national reparation programmes for victims and institutional reforms, which the Council drew attention to in resolution 1894 (2009) are so important. In addition, the Council itself has set important precedents, including the establishment of commissions of inquiry on Bosnia, Rwanda and Darfur which paved the way for the international tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, and the referral of the situation in Darfur to ICC in 2005.

More recently, we saw the Council refer the situation in Libya to ICC.

We have seen Council action too in the establishment of the United Nations Compensation Commission in 1991, addressing an area of accountability that is frequently overlooked — the responsibility of parties to conflict to make reparations for violations of international humanitarian law and human rights law. Security Council and national practice in this area is particularly rich and varied Although the tendency is to think of financial compensation, there have been important instances that focused on resolving disputes over title to property. And there have been important decisions in terms of the recipients of reparation — not just individuals but also affected communities. Clearly, we must better promote and support such efforts in the future.

Accountability is not just about extended and lengthy legal processes. It is about tackling the real human cost of conflict and war crimes. Governments and individuals need to confront and acknowledge the consequences of their actions.

Today's workshop will discuss these and other important issues. And while it is critical that we review the Council's past decisions, it is equally important that we

focus on the future — on how to bring about more effective and consistent Council action on accountability and in doing so ensure that scrutiny and accountability, and, crucially, justice become the norm.

Opening statement by Kyung-wha Kang, Deputy United Nations High Commissioner for Human Rights

I welcome this important and timely thematic discussion on accountability and fact-finding mechanisms for violations of international humanitarian law and human rights law: the role of the Security Council — past and future, organized by the Permanent Mission of Portugal to the United Nations, the Office for the Coordination of Humanitarian Affairs and the International Peace Institute. I thank the organizers for inviting me to address this meeting and to relay the experience of the Office of the United Nations High Commissioner for Human Rights on fact-finding mechanisms. I have five points to make.

First, as the Security Council has recognized in several resolutions, international law considers that when acts of gross violations of international human rights law and serious violations of international humanitarian law that may constitute crimes under international law are committed, States have the duty to investigate, and, if there is sufficient evidence, to submit to prosecution the person allegedly responsible for the violations. If this person is found guilty, they have the duty to punish them and to provide an effective remedy and reparation to the victims. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. When States fail to fulfil these duties, the international community collectively bears the responsibility to ensure accountability.

Second, accountability for violations is required not only to fulfil international legal obligations; it is key to prevention, protection, sustainable peace and non-recurrence. Accountability is a broad concept that encompasses the establishment of facts, the identification and prosecution of perpetrators, and, from the victims' perspective, reparation. The right of victims of gross violations of human rights to reparation represents a fundamental tenet of international human rights law. There is a need for greater focus to support the victims of violations through reparations and ensure practical arrangements for the realization of this right. The Council has an important role to play in that regard.

Third, in many situations, the Security Council has recognized serious violations of human rights and international humanitarian law as possible threats to peace and security. It has given increased attention to human rights issues in its resolutions, including on country situations. In recent situations, such as those in Côte d'Ivoire and Libya, the Council welcomed commissions of inquiry established by the Human Rights Council. This has demonstrated how concrete action to enhance peace and security and the protection of human rights are closely linked. The Security Council's role to further human rights protection is also evident in its deliberations on thematic issues such as the protection of civilians, sexual- and gender-based violence, and the protection of children in armed conflict situations.

Fourth, accountability and fact-finding mechanisms should be seen in the broader context of the aim to enhance human rights protection. Rigorous fact-

finding and investigation of allegations of serious violations of international human rights and humanitarian law is an essential component of protection efforts.

Responding to requests by intergovernmental bodies, including the Security Council and the Human Rights Council, OHCHR has built over the years a standing capacity to support international commissions of inquiry and other types of fact-finding and investigative mechanisms. In recent years, in particular, there has been a significant increase in requests for OHCHR to provide its expertise and support to such bodies. In 2011 alone, OHCHR supported three international commissions of inquiry and one fact-finding mission, on Côte d'Ivoire, Libya and the Syrian Arab Republic. At the same time, the High Commissioner dispatched, based on her general mandate, three human rights assessment missions to Egypt, Tunisia and Yemen.

The increased use by the international community of commissions of inquiry and fact-finding mechanisms as a way to ascertain disputed facts as well as responsibilities and to recommend options to pursue this broad concept of accountability is a welcome development. More consistent follow-up to their recommendations will help meet the expectations that their establishment legitimately raises, especially among victims, and advance protection from and prevention of violations.

I do also wish to emphasize the important fact-finding standing role played by the special procedures mechanisms of the Human Rights Council. These are standing fact-finding mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. There are currently 33 thematic and 8 country mandates. Our Office provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates.

Fact-finding, investigation and reporting are also core activities of OHCHR field offices and human rights components of peace missions. As I speak, more than 1,500 United Nations human rights workers are deployed all over the world in 56 countries. Through them, we gather a wealth of information on human rights violations and their causes. In conflict, post-conflict and other volatile situations, our presence on the ground provides access and protection to populations at risk, enables us to engage with both State and non-State actors to encourage greater compliance with the law and ensures that if violations are committed, they are properly documented and reported. An important body of international standards and methodologies has been developed and consolidated, which guides such human rights work.

Fifth, the international criminal justice system has made important strides towards ensuring accountability and ending impunity. The Security Council not only established ad hoc tribunals and hybrid tribunals, but already referred two situations to the International Criminal Court. In the case of Darfur, the Council acted on a recommendation by its International Commission of Inquiry, and in the case of Libya, the referral took place while the Commission of Inquiry established by the Human Rights Council was still carrying out its investigations and fact-finding. OHCHR supported the work of both commissions. The relationship agreement between the United Nations and the International Criminal Court, approved by the General Assembly, provides ways the two institutions can cooperate, each within the parameters of its role and mandate.

I would like to end by thanking the organizers for this important meeting. My colleagues and I are looking forward to the exchange of views about how international fact-finding and accountability mechanisms can play a crucial role in the protection of human rights of all individuals as well as the maintenance of international peace and security.

Opening statement by Fatou Bensouda, Deputy Prosecutor of the International Criminal Court

Thank you for being here; and thank you to the mission of Portugal for this kind invitation to speak at this important event.

I have the privilege and the responsibility to be the Deputy Prosecutor of the International Criminal Court; accountability for serious human rights' violations and international humanitarian law is at the heart of my work and that of the Office I represent today.

The Rome Statute of the International Criminal Court, created in 1998 in Rome under the guidance of the Secretary-General, defines the mission of the Office of the Prosecutor: to put an end to impunity for the most serious crimes of concern to the international community — genocide, crimes against humanity and war crimes — and thus contribute to the prevention of such crimes. The Office and the Court itself are part of a new system of international justice, now with 119 States parties, committed to prevent and punish massive crimes. This represents 2.2 billion people in this world.

The Court is modifying the dynamics of the United Nations model, without changing the rules. The Charter of the United Nations envisaged a collective security system to maintain international peace and security. This was a huge advance, but it left all critical decisions in the hands of politics. With the adoption of the Rome Statute model, States parties shifted the paradigm — from the Westphalia model of national self-regulation, to the United Nations model of international scrutiny under the supervision of the Security Council, to the Rome Statute model of the rule of law.

Accountability provides the framework to protect individuals and nations from massive atrocities and to manage conflicts.

The Court will naturally do only a few cases — the primary responsibility for investigating and prosecuting crimes lies with States themselves — but each case has an exponential impact; this is where the true relevance of ICC lies: in its reach beyond the confines of the courtroom. This "shadow" of the Court is already affecting the behaviour of Governments and political leaders; armies all over the world are adjusting their operational standards; conflict managers and peace mediators are refining their strategy taking into account the work of the Court, respecting the legal limits. They all have a role to play in ending impunity for massive crimes.

The Lubanga case — even before a final ruling — has already helped demobilization, including in States not party to the Statute like Sri Lanka and Nepal.

In Colombia, the prospect of the Court exercising jurisdiction was mentioned by prosecutors, courts, legislators and members of the Executive Branch as a reason to make policy choices in implementing the Justice and Peace Law.

We see how the Rome Statute system is impacting other institutions. The unanimous referral to the Court by the Security Council of the situation of Libya, including positive votes of five non-States parties, was a major achievement. It shows that the world increasingly understands the Court.

As the Secretary-General said during the opening session of the Review Conference of the Rome Statute of the International Criminal Court in Kampala:

> Now we have the ICC, permanent, increasingly powerful, casting a long shadow. There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders, whether they are lowly civil servants following orders, or top political leaders, they will be held accountable.
>
> Thank you.

Panel 1: individual criminal responsibility

Security Council practice
Richard Dicker, Director of the International Justice Programme, Human Rights Watch

A. Introduction

The Security Council has a history going back nearly 20 years of promoting accountability pursuant to international criminal law where the most serious crimes of concern to humankind — genocide, crimes against humanity and war crimes — have occurred. This began with the Council's establishment of the ad hoc tribunals for the former Yugoslavia in 1993 and then a year later for Rwanda.

Following the establishment of the permanent International Criminal Court, the Council has continued this role through referrals to ICC. In the former Yugoslavia, Rwanda and Darfur, after taking ineffectual steps to halt widespread killings, the international community was horrified by the scale and nature of the violence. The Council responded to widely felt shock by creating the two ad hoc tribunals and referring Darfur to ICC.

In Libya, after the shooting of peaceful demonstrators attending mass protest rallies in several cities, and threats to eliminate political opponents reminiscent of language used by Rwanda's genocidal Hutu extremists, the Council unanimously voted to refer the unfolding situation in Libya to ICC to deter the potential for widespread slaughter there.

From these examples, one can conclude that there are situations where the Security Council, confronted by horrific human rights crimes, acts on behalf of justice.

These steps took place in a manner consistent with the relevant — and almost universally accepted — international legal instruments including the Charter of the United Nations and the Geneva Conventions of 1949, among others.

From a policy perspective, these important measures by the Council have strengthened respect for international law and placed the Council on the right side of

the fight against impunity in a way that advances the United Nations fundamental objectives.

I will very briefly touch on the legal foundations for these steps and then focus on key points relevant to the Council's work going forward at a time when the expectations for Security Council action on behalf of justice are likely to increase qualitatively. There are important lessons to be learned as the Council heads into its third decade of limiting impunity through international judicial mechanisms.

B. The basis in law
Resolutions 827 (1993), 955 (1994), 1593 (2005) and 1970 (2011)

The creation of the International Tribunal for the former Yugoslavia in 1993 raised, not surprisingly, important legal issues. Many of these concerned whether the Council's action was lawful. These questions were definitively answered in the ICTY Appeals Chamber decision in the case of Dusko Tadic.

The Appeals Chamber found that under Article 39 of the Charter, the Security Council was empowered to decide what measures shall be taken in accordance with Article 41 (these are measures not involving the use of armed force) to maintain or restore international peace and security.

Creating tribunals or referring situations to ICC falls squarely within the powers under Article 41. I would argue, as the Appeals Chamber found, that the International Tribunal was lawfully established as a measure under Chapter VII of the Charter.

C. Policy implications

Time does not permit a comprehensive review of the implications of these Council actions, but I want to highlight a few policy issues embedded in this practice.

1. Impact on the rule of law at the national level

First, the establishment of the ad hoc tribunals motivated national authorities to take up the fight against impunity for these same crimes. This is crucial in deepening respect for the rule of law.

- The existence and work of ICTY spurred the establishment of national courts in Serbia, Bosnia, and Croatia
- The existence and work of ICTR led to considerable pressure and incentive for Kigali to reform the justice system in Rwanda
- The two tribunals also spurred domestic prosecution under universal jurisdiction laws in countries in different regions

One sees in these examples the positive "leverage effect" of Security Council action through international justice that empowers national courts.

2. Justice and peace

Second, for the Council, with its paramount authority to maintain international peace and security, the pursuit of justice has given rise to sharp debate about the

interface between justice and peace. One trend contends that the pursuit of justice is antithetical to peace negotiations. In fact, a closer scrutiny of the country situations in which the Council has triggered judicial action provides very different lessons. In reality, not only is justice — by honouring victims and asserting the rule of law — an important end in its own right, it can often contribute substantially to securing a durable peace.

The Balkans

As a by-product of the ICTY indictments, contrary to the conventional wisdom of the mid-1990s, rather than blocking a peace settlement, the Tribunal's indictments contributed to sidelining the likes of Radovan Karadžić, Ratko Mladić and, ultimately, Slobodan Milosevic, not to mention countless other perpetrators of crimes against humanity. This justice-induced "marginalization" contributed to moving these societies towards integration into the European Union, where support for the rule of law is a requirement.

The Sudan

In March 2009, when the arrest warrant for President Omar al-Bashir was issued, some predicted that this judicial order against the Sudan's sitting head of State would destroy prospects for implementing the 2005 Comprehensive Peace Accord. True to its nature, Khartoum expelled humanitarian groups, deepening hardship for the huge population of internally displaced persons in Darfur, but, in January 2011, the long planned secession referendum occurred and in July of 2011 South Sudan seceded. The Peace Accord has had serious problems in Abeyi and South Kordofan, but none of this was a result of the ICC arrest warrants.

Instead of putting a conflict to rest, allowing a de facto amnesty that grants immunity for serious crimes may just spur another cycle of grave abuses while failing to bring peace.

Yemen

In this context, I will say a word about the recently passed Council resolution on Yemen, a long overdue condemnation of the Yemeni Government abuses. Nonetheless, the Security Council should have more clearly distanced itself from the Gulf Cooperation Council's political package. By signalling that there would be no consequence for the killing of Yemenis, the immunity deal has contributed to prolonging the bloodshed. President Ali Abdullah Saleh and his entourage need to know: there is no immunity for serious crimes under international law.

3. Referrals are unlike other tools in the Council's tool kit

Three, creating a tribunal or making a referral is quite different from the other means available to the Security Council in its diplomatic tool box. Unlike deploying peacekeepers, imposing sanctions, arms embargoes and the like, a referral to ICC, for example, sets in motion an independent judicial process that the Council cannot then flick on and off like a light switch. Once an international judicial process is in place, it is too late to turn back the clock.

At the same time, once in motion, these Courts lack their own enforcement mechanisms and need the Council's continued engagement and support. The

Council cannot expect its ICC referral resolutions to have impact without remaining continuously engaged in support of the Court. This would include providing the funding necessary for court investigations rather than simply placing burden on the ICC States parties.

Justice-supporting States on the Security Council need to recognize that the lack of consistent diplomatic support for the Court gives fuel to the argument of those who say that the fight against impunity is nothing more than politics clothed in judicial trappings. Wavering comes with a high price.

4. Referrals do not necessarily taint the subsequent judicial proceedings

In conclusion, I want to speak to a fourth question that has arisen in the wake of Security Council action for justice: does a referral by the Council, a political body, to a court taint the resulting judicial proceedings with politics?

In an analogous case, the International Court of Justice decisively determined that as long as the case before it turned on a legal question capable of a legal answer, it considered that it was duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue.[a]

The ICTY Appeals Chamber found that this reasoning applied almost literally to its work.

At the same time, it is imperative for the officials of these courts — judges and especially their prosecutors — to apply their mandate an impartial and independent way. While these courts work on a highly polarized, divisive landscape it is incumbent on them to implement their judicial mandate in a way that is consistent with the highest principles of criminal justice professionalism and rise above the perception of politics.

Of course, there is selectivity in the referrals the Council makes — say, justice for victims in Darfur but not Gaza — that selectivity rests with the Council, not the Court.

D. Conclusion

For the Council to maximize its relevance and effectiveness in the early decades of this new century, it is important to give closer scrutiny to some deeply held assumptions that may no longer be relevant. That said, the Council's practice provides a rich experiential basis by which to assess lessons learned.

Non-Security Council practice: the case of the Special Court for Sierra Leone
Simone Monasebian, Chief, New York Office, United Nations Office on Drugs and Crime; former Principal Defender, Special Court for Sierra Leone

First allow me to pay tribute to Ambassador Moraes Cabral for his unflinching commitment to those most vulnerable and under threat, be it in the Security Council this month when he will examine emerging threats, or in the Peacebuilding Commission, where he has been a leading voice in beefing up crime prevention in West Africa, or in the General Assembly, where he brilliantly brokered a global plan

[a] Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).

of action to combat human trafficking. May today's workshop assist you and your fellow Council members in maximizing accountability efforts.

A. Non-Security Council practice?

My remarks come under the heading of non-Security Council practice, and while the Special Court for Sierra Leone (SCSL), unlike ICTR and ICTY, was not created under Chapter VII of the Charter, the Council has nevertheless been an important actor in SCSL since its inception.

Indeed, it was Security Council resolution 1315 (2000), in which the Secretary-General was requested to negotiate an agreement with the Government of Sierra Leone to create an independent special court with jurisdiction over those who bear the greatest responsibility for the commission in Sierra Leone of crimes against humanity, war crimes and crimes under Sierra Leonean law. Of course, resolution 1315 (2000) was in response to an initial request by the President of Sierra Leone to the Secretary-General two months earlier.

The Special Court was finally established jointly by the Government of Sierra Leone and the United Nations in a 2002 agreement. Its temporal jurisdiction is limited to crimes committed in Sierra Leone since 30 November 1996, which of course does not cover the entire 11 years of that conflict.

The agreement between the United Nations and the Special Court provided that the Court have its seat in Sierra Leone, but that it may meet elsewhere if necessary and may even be relocated outside the country, if required.

The first prosecutor was appointed in 2002 and the first trial began in June 2004. Since then the Court has issued 13 indictments. Eight defendants were convicted and have been serving out their sentences of from 15 to 52 years. Those convicted have been in the Rwandan prison system since their October 2009 transfer from Freetown. A ninth defendant, Charles Taylor, awaits judgment in The Hague. Three other defendants have died before or during trial, and one remains at large.

Jurisprudentially, the Court is perhaps best known for its being the first international tribunal to issue convictions for the conscription and recruitment of child soldiers (one of the most heinous forms of human trafficking).

The Security Council's relationship to the Court did not end with resolution 1315 (2000). Resolution 1626 (2005), for example, extended the mandate of UNMIL to include the protection of the Court's premises by a contingent of United Nations military personnel.

Resolution 1688 (2006), taking note of the Court's intention to exercise its functions away from Sierra Leone, requested all States to cooperate in the transfer of Charles Taylor to the Netherlands.

Article 19 of the Court's Statute allows the Court to order the forfeiture of unlawfully acquired proceeds and provide for their return to rightful owners or the State. It was hoped that resolution 1521 (2003) and resolution 1532 (2004), which called for the freezing of assets, would be made available to a national process of victim compensation, as the Court's mandate does not include victim compensation.

Article 6 of the 2002 agreement between the United Nations and the Government of Sierra Leone, on the establishment of the Court, provides that

although the Court is to be funded through voluntary contributions, should they be insufficient to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Special Court. Several requests for subvention grants, or requests from the Secretary-General to the General Assembly to bail out the Court, have been granted since the second year of the Court's operation. Another application will be entertained next month.

It should also be noted that since the adoption of resolution 1315 (2000) some 11 years ago, the President and Prosecutor of the Court have periodically briefed the Council on its progress, while not as regularly as ICTY and ICTR. The President and Prosecutor of the Special Court have found such opportunities to be most helpful to their mandate.

Now that I have given a brief overview of the Court, I will touch on some of the advantages and disadvantages of the decision to establish it as a hybrid court.

B. The case for a hybrid

By the year 2000, "tribunal fatigue" had already begun to set in since the establishment of ICTY and ICTR in the seven preceding years. The international community had tired of what they rightly or wrongly felt to be two slow moving, large, costly structures that according to some, had questionable relevance to those most affected by the crimes. While more could have been done to address these problems early on at ICTY and ICTR, eventually a number of initiatives were undertaken by their very committed registrars and prosecutors to ameliorate this situation.

The advantages of the Special Court's hybrid status, or at least what the founding fathers of the Court believed to be its advantages are as follows:

1. As they say in the real estate business, "location, location, location": (a) the seat of the Court being in the country where the crimes occurred, although only three of the four trials were held in Freetown and the fourth, Taylor's, was held in The Hague; (b) the idea that the location would result in a more informed judgment because the record would reflect greater knowledge of the events; (c) the court's impact would be felt through its presence and outreach efforts in the country, and it would thus be more relevant, more known: publicity, as Jeremy Bentham said, being the very soul of justice; and (d) its potential would be to positively affect the national legal system not only through its example, but also through projects it would undertake;

2. Its "mixed" or "hybrid" make-up including a minority of judges appointed by the Government of Sierra Leone, as well as, at least in theory, a Sierra Leonean Deputy Prosecutor (I say in theory because the first Deputy Prosecutor nominated by the Government of Sierra Leone was not a Sierra Leonean). ICTR and ICTY do not have judges or a deputy prosecutor from the country in which the crimes occurred. Sixty per cent of the Special Court's staff is Sierra Leonean. It has, however, been argued by some that including Sierra Leonean judges in the Special Court is a mixed bag, if one looks at the Sierra Leonean judges' dissenting opinions in the judgments and sentences in the CDF case — the case of those using a just war necessity defence. Others argue that such a debate is healthy and that the perspective of judges who know the conflict, the people and the context results in their being better able to understand the cases;

3. Its more narrow mandate to focus only on those who bear the greatest responsibility, with the expectation that this would lead to judicial efficiency and a short time frame for the court's work;

4. Its anticipated cost-effectiveness, based on a more flexible oversight mechanism through a management committee composed of the main donors and interested countries, and the expectation of reducing the running costs and avoiding the United Nations bureaucracy. While the Special Court is the first international criminal tribunal to be funded entirely from voluntary contributions from Governments, there are, however, problems with voluntary contributions, including a lack of reliability, earmarking and the appearance of a lack of independence or conflicts of interest (see, for example, general arguments against voluntary contributions made by the Group of 77 (G-77) in terms of the overall United Nations budget). Moreover, voluntary contribution models require a major emphasis on fundraising, diverting a lot of effort from other areas of work. Clearly, voluntary funding did not meet its objectives in the Special Court, as the Court was constrained to repeatedly seek subvention grants. All in all, it was not less costly than the ICTR/ICTY ad hoc courts;

5. The possibility of increased flexibility resulting from the Court not being a United Nations entity, and this perhaps leading to innovation and less bureaucracy. While this allowed the Court to minimize bureaucracy in some areas, the application of looser standards in areas related to hiring, firing and oversight of personnel-related matters in the Court's early years also resulted in a lack of transparency and accountability in certain decisions.

C. Some disadvantages of hybrids

Some have argued that the Court not being created under Chapter VII, is a disadvantage. However, this argument succeeds only in theory. It is unlikely Charles Taylor would have been tried earlier on even with Chapter VII power. The ad hoc tribunals with Chapter VII power took many years to apprehend Ratko Mladić and Radovan Karadžić in ICTY, and Félicien Kabuga is still in hiding from ICTR.

Some argue that a hybrid court can result in a "negative legacy", if it drains domestic capacity as local professionals try to move to the hybrid court; diverts the focus away from investment in the necessary domestic legal reforms; or contributes to negative perceptions of the local legal system. This may also result in a long-term problem if staff use experience at the Special Court to obtain jobs out of the country, never returning to the domestic system.

It has also been argued that the over $100 million spent on the Special Court would have been better spent on the domestic legal system. The same has been said of hybrid courts for Bosnia and Cambodia. The answer to this in my view is, however, not that less should be spent on hybrid courts, but that more focus and funding must be afforded to post-conflict national justice systems as a whole.

The funding structure of the Special Court, touted as being one of its greatest advantages, has detracted from the Court's overall success. The Court's second Chief Prosecutor told me his biggest disappointment was the fact that he had to spend so much time travelling all over the world to raise funds for the Court instead of working in Freetown on outreach and legacy. Likewise, although I had hoped to focus a significant portion of my tenure as Principal Defender on legacy, outreach

and building a pillar of the Court that could serve as a real counterbalance to the overwhelming power of the Prosecutor, I had to spend an inordinate amount of time administering a perhaps well-intentioned in theory, but bureaucratic and unrealistic, so-called lump sum fee structure, that not only wasted much time, but also led to internal struggle and conflicts between junior and senior defence lawyers within Sierra Leone, and clashes between international and national defence lawyers we mixed into trial teams. Also problematic was the particular inequality of arms caused by the defence not having a true voice in the Court until long after a prosecutor was appointed, and even when that voice was truly present, it was hampered by a lack of resources.

D. Lessons learned from a hybrid model

Policy priorities should be developed from the start in creating such courts, stressing not only trials and convictions, but also the creation of a solid legacy programme. The First Prosecutor of ICTY, upon his appointment, announced that whether there were convictions or whether there were acquittals would not be the yardstick of ICTY; the measure was going to be the fairness of the proceedings. The yardstick for measuring success at a hybrid court must be its legacy for the people most affected by the crimes, in this case in Sierra Leone. Did it have a demonstrable effect on promoting a culture of rule of law? Did it build capacity in the national legal system through professionally developing national staff and through training and programming investment in the domestic system and civil society institutions? Were national staff included in the most senior positions? While there were some successes in Sierra Leone, many were very late in the making. Sierra Leoneans were only really incorporated in the most senior posts very late in the game. The impact of institutions like SCSL on peacebuilding, and their ability to shape a country's future can be fully realized only if the citizens of that country have some real ownership in the Court.

The first three defence duty counsel hired by the court were Sierra Leoneans. When I came to the Court they held very junior positions in my office. I worked hard to attempt to upgrade their posts and ensure that my successor came from the region. Today, of those three duty counsel, one is now Principal Defender, the other works for the Government of Sierra Leone and the third went on to become a prosecutor and then a defence lawyer at ICC. They worked hard to achieve the success they have found both in and outside the Court, and the existence of the Court provided them with excellent opportunities to do so. The Court's third Deputy Prosecutor, a Sierra Leonean, is now the country's anti-corruption commissioner. The former chief of the Court's outreach section is now the Court's Registrar. These are positive legacy moves. A substantial portion of the premises built for the Court is now being used by the Sierra Leone Law School, which did not have sufficient space, and the Court's presence is itself bolstering interest and enrolment in the school. The rest of the Court's premises will be turned over for judicial training and other rule of law matters. With the convicted now serving sentences in Rwanda, the detention facility in Freetown is now being used to house vulnerable prisoners, including women and juvenile detainees. The guards serving the Special Court now serve that facility and the national security of the President, having received the finest training in their tenure at the Special Court.

According to the Open Society Justice Initiative, defence lawyers, however, are hard to come by in Sierra Leone. There are only about a hundred practicing

lawyers in the country and more than 90 of those are located in the capital, Freetown. The Lawyers Centre for Legal Assistance, based in Freetown, provides much needed legal assistance to indigent clients, but the Centre is unable to meet demand — suggesting the need for more legal aid — and its activities are largely limited to Freetown and provincial headquarter towns. It is regrettable more could not be done by the Special Court to address this major impediment to rule of law. Rights of the accused in the court and the country where the court is situated must be better mainstreamed into the work of future Courts.

Such courts should draft an outreach strategy before the court commences, outlining community needs and the court's goals, and troubleshooting potential problems in advance. Publicity may be the very soul of justice, but if it is not handled carefully it can facilitate injustice. The Special Court of Sierra Leone, the first war crimes tribunal since Nuremberg to be based in the country where the atrocities occurred, was determined to make public outreach and the publicizing of justice a priority. Particular effort was paid to conducting press briefings and town hall meetings held by the prosecutor all over Sierra Leone, at the pre-indictment and pretrial stages. The Court's first prosecutor, appointed in June 2002, arrived in Freetown in August. A Special Court Outreach Office was immediately set up and located in the Office of the Prosecutor. With no defence counsel yet hired, or any figure yet appointed as a counterbalance to the overwhelming power of the prosecutor, defence outreach issues were not a Court priority. In January 2003, the Outreach Office was relocated from the Office of the Prosecutor to the Court's Registry Section, but even this move could not level the playing field. The prosecution already had a huge head start in shaping public opinion in the media and at the grass-roots level, and the defence lawyers felt that some of the statements made were quite prejudicial. Better resourced and better staffed, the prosecution could afford to devote more attention to outreach than could the defence. Although the Court created a Principal Defender position in early 2003 to counterbalance the prosecutor and serve as a "fearless advocate" for the defence, over a year went by before they appointed anyone to that position. In the interim, the office was staffed by two or three extremely devoted Sierra Leoneans, and two different hardworking acting heads of the defence office.

When I was appointed that Court's Principal Defender in March 2004, over a year and a half after the Chief Prosecutor's appointment, and only three months before the first trial began, the staffing and resources for the defence had already been decided, and it was rather late in the game for any real counterbalancing. On my last day of the job, the judges passed a code of conduct for defence and prosecution counsel containing a rule on contact with the media providing, inter alia, that counsel shall not comment on any matter which is sub judice in any case in which he is involved. ICTR and ICTY had no such rule. I argued unsuccessfully that this would compound the headstart the prosecution already had. However, the Judges adopted this rule after expressing concerns about the media poisoning the well. In their view, justice was best served if both sides could no longer speak on pending matters. I felt their antidote to be more prejudicial, impact-wise, on the defence.

Likewise, as far as outreach, how serious are we about that when on the Court's scale of culpability those fighting in the bush get trials in Freetown, and those alleged to be fighting from their presidential office are tried on another continent: for example, Taylor in The Hague. How is justice being seen to be done

from a continent away? What are we saying about our commitment to bringing peace and justice to the place where the crimes took place if we can only try Taylor elsewhere?

And as referred to earlier, to avert the Court's funding problems, the framers should ensure that a percentage of its operations are assured of funding by the United Nations. Funding of outreach should also be mainstreamed into the core funding of the court.

Finally, we need to mainstream victims' participation and compensation into the works of these courts in the future. This was not done in the Special Court, nor the ad hoc courts, but is being done at ICC.

Non-Security Council practice
Robert Young, Deputy Permanent Observer of the International Committee of the Red Cross to the United Nations

A. Introduction

Thank you, Ambassador, and thank you so much to the organizers.

I would like to tell you a story, and ask some then share some observations and questions, all related to individual criminal responsibility. I hope this will help launch the exchange with you that will follow.

I have circulated a short ICRC document entitled "The role of States in prosecuting violations of international humanitarian law". It addresses many of the points I will cover today.

B. The story

In 1999 and 2000 I was an ICRC delegate in eastern Ethiopia. For the last part of my mission I was based in Jijiga, the main town in the Ogaden region, also known as Somali Regional State. We were launching a drought relief operation, hiring staff, purchasing seeds, contracting for water delivery, trucking food flown in to Dire Dawa airport. It was intense.

In the middle of this, I received an invitation, through the Ethiopian Red Cross, to give a briefing to new police recruits on international humanitarian law. I was told: 50 to 100 recruits, IHL 101, it will take 45 minutes.

On the appointed day, I showed up and found an audience of more than 300 recruits, bright-eyed and keen, in their late teens and early 20s, in new uniforms. They came from some of the most remote corners of that part of Ethiopia, from villages and nomadic communities. With them were 40 officers in crisply ironed shirts and pants, with pens and notebooks ready, as they led by example.

And I discovered that my twenty-minute presentation would take at least an hour, as it had to be interpreted into Amharic and then into the Somali language. This requires a certain focus for all involved, most of all the audience. I was impressed with the level of interest the recruits maintained all through my presentation and through the longer question and answer period.

I can't remember all the questions, which touched on the ICRC, humanitarian principles and various aspects of IHL and how all these might relate to the police

recruits in their new careers. I still remember one question to this day. One recruit, I can call him Ahmed Umer (not his real name), asked me this:

> If we make some serious mistakes while doing our jobs, like committing war crimes, will we be sent before the International Criminal Court? Or what if we capture people who do such things?

Remember, this was early 2000, before the Rome Statute had entered into force, and Ethiopia had not signed or ratified it. Yet here were police recruits, as far as could be from Addis Ababa, not to mention Rome or The Hague, who had heard of ICC and were concerned about their criminal liability before it.

I could stop there and I think that would be a nice little story, about ICC and its impact.

But there's much more to it. Let me continue.

As you may know, since the 1950s Ethiopia's criminal code included many war crimes, as well as the crime of genocide. In fact, before the drought operation I had spent the previous year in Ethiopia mainly visiting prisons, monitoring the conditions of detention of many persons facing charges of war crimes and genocide, and I took part in a pilot trial monitoring project. I want to repeat that part. I was monitoring war crimes trials in domestic courts, to ensure respect for judicial guarantees. That's not something most ICRC delegates ever have a chance to do. In the case of Ethiopia, there were so many cases that trial delay was becoming an issue — a rare problem because so few States conduct war crimes prosecutions in their courts.

So I was delighted by the question from Ahmed Umer about accountability, and here's how I answered:

- First, the architecture of IHL gives States the primary responsibility for investigating and prosecuting serious violations of IHL
- Second, the adoption of the Rome Statute didn't fundamentally change this but reinforced it
- Third, because Ethiopia had adopted laws to implement the Geneva Conventions in their domestic criminal law system, Ahmed Umer and his peers needed look no further than their national criminal code. (This last comment, by the way, was met with approving nods by Ahmed Umer's officers — a good sign.)
- Finally, I told Ahmed Umer that perhaps during his career Ethiopia would join the Rome Statute. Which remains true today.

C. Some observations and questions

- The birth of ICC was a vital step in ensuring accountability for violations of IHL. Nevertheless, the spectre of trials in The Hague which we can all watch on webcast should not obscure the reality that it is up to States to prevent and punish violations of IHL. (Put another way, it is up to Ahmed Umer to do his job well.)
- The same is true for the Security Council's engagement in an agenda to protect civilians in armed conflict. It is above all States which are responsible.

- Like Ahmed Umer, I think we all sometimes risk focusing on the Court in The Hague or the next resolution of the Council at the expense of the focus on the role of national authorities.
- The fact is, many States have not fully implemented their treaty obligations, under the Geneva Conventions and their Additional Protocols, or other IHL treaties, into their domestic legal order.
- In addition, the community of States has not created enough positive peer pressure for this.
- Investigations and prosecutions for war crimes at the domestic level are more frequent than in the past, but remain rare. Again, there is still today a lack of peer pressure among States to launch and complete investigations at the national level, and to ensure reparations for victims.
- The Security Council can be more effective in encouraging States to do more to investigate and prosecute serious violations of IHL. How can this be evaluated? How can the Council "incentivize" States to act on impunity?
- Clearly, the Council's protection of civilians agenda, including the periodic debates, the aide memoire (which could be used more effectively), the monitoring and reporting mechanism on children and armed conflict, the new arrangements for sexual violence in conflict, including the availability of the experts who can be deployed to advise national authorities are all steps in the right direction.
- Another important strand is the convergence of the growing momentum on the rule of law work of the United Nations and the transitional justice/action on impunity agendas. This is an area that merits further attention.
- Clearly, more needs to be done by many more States, and by many more public officials like Ahmed Umer.
- Indeed, in our discussion today and going forward in New York, I would suggest that we may all need to think hard about how we can help Ahmed Umer to do his job well, along with his counterparts everywhere.

D. Conclusion

I will conclude here, thanking you all for your attention.

Panel 2: Fact-finding mechanisms

Security Council practice
Erwin van der Borght, Africa Program Director, Amnesty International

I will start my presentation by briefly reviewing some of the initiatives the Security Council has taken in setting up fact-finding mechanisms, going back as far as the early 1990s.

In October 1992 the Council requested the Secretary-General to establish, as a matter of urgency, a commission of experts with regard to the former Yugoslavia, to conduct investigations into violations of international humanitarian law committed in the territory of the former Yugoslavia.

The commission worked for two years, during which it identified over 800 places of detention, an estimated 50,000 cases of torture and 200,000 deaths, and an estimated 2 million displaced persons as a result of ethnic cleansing, and conducted an extensive investigation into systematic rape, including over 500 affidavits of victims who identified their perpetrators.[b]

The commission of experts was asked by the Council to continue its work pending the appointment of a Prosecutor for the International Tribunal. The Council had decided to establish such an International Tribunal in February of 1993. The commission of experts finalized its work in early 1994.

In a second example, on 1 July 1994 — three months into the genocide in Rwanda — the Security Council requested the Secretary-General to establish, as a matter of urgency, a commission of experts to investigate violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.

Although the mandates of both commissions of experts were similar and they both led to the creation of an International Tribunal, they were not comparable in terms of the depth, scope and duration of the work they accomplished. The Rwanda commission of experts had to report within four months, hardly spent any time on the ground and avoided many of the difficult questions, including for example why no action was taken by the Security Council to prevent the genocide.

The commission of experts for Rwanda concluded that individuals from both sides had perpetrated war crimes and crimes against humanity and that abundant evidence showed that the mass exterminations perpetrated by Hutu elements against the Tutsi group constituted genocide.

I would like to highlight another less successful example of a fact-finding mechanism which was set up by the Security Council around the same time. In 1995 the Council asked the Secretary-General to establish an international commission of inquiry for Burundi, with a mandate to investigate the assassination of the President of Burundi in October 1993 and the massacres which followed as well as to recommend measures to bring to justice persons responsible for the killings, to prevent any repetition and to eradicate impunity and promote national reconciliation in Burundi.

It is important to note that the Government of Burundi had itself requested that an international judicial commission of inquiry be established.

The final report of the commission of inquiry was presented by the Secretary-General to the Council in August 1996, one month after the 1996 coup d'état in Burundi — which once again dramatically changed the political context in the country. The conflict in the eastern Democratic Republic of the Congo (Zaire at the time) started shortly afterwards.

Discussions and negotiations on ensuring accountability for crimes under international law have continued for years in Burundi, including with the United Nations.

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[b] M. Cherif Bassiouni, "Appraising United Nations justice-related fact-finding missions", *Journal of Law & Policy*, vol. 5 (2001).

In 2011 progress was finally made in efforts to establish a truth and reconciliation commission, including by reviewing legislation to establish such a commission. However, no action has been taken by the Burundian Government to establish a special tribunal (a judicial mechanism of a mixed character composed of both national and international judges and prosecutors). More than 15 years after the Security Council initiated the commission of inquiry, nobody has been held to account. The Burundi example demonstrates the difficulty for the Council of keeping the momentum on a given situation, including the necessary political will and pressure over a prolonged period of time to ensure accountability.

The report of the commission of inquiry for Burundi also contained some valuable comments which may be useful in other situations. The Commission decided to conform its fact-finding activities, insofar as possible, to judicial standards in order to amass evidence that could be of use for any later judicial action. This is of particular importance in situations where no investigations were conducted for years by the local judiciary and where no international judicial body was set up.

The commission of inquiry also highlighted the following difficulties:

- The time elapsed since the events under investigation (two years in their case)
- Ethnic polarization that made it very difficult to obtain reliable testimony
- A bad security situation
- Inadequacy of resources (administrative support, investigators, material support)
- Insurmountable difficulties in its efforts to obtain evidence (for example, could not inspect files, nor summon witnesses specifically within the military)
- No means to offer protection to witnesses.

I now jump a decade to briefly review the experience with regard to Darfur, Sudan.

Amnesty International first called for an international commission of inquiry in April 2003 in the light of the deterioration of the human rights situation in Darfur and the inaction of the Sudanese authorities. It took another 18 months before it was established by the Council, and an earlier response could have prevented numerous abuses.

In September 2004 the Security Council requested that the Secretary-General rapidly establish an international commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide had occurred and to identify the perpetrators of such violations with a view to ensuring that those responsible were held accountable.

The report was presented to the Council on 1 February 2005, as the International Commission of Inquiry was asked by the Secretary-General to report within three months of its establishment and was therefore operating under difficult time constraints. The Commission — deemed by many as a textbook example on how such a mechanism should work — nevertheless highlighted the lack of

resources to appoint sufficient investigators, lawyers, military analysts and forensic experts as an important constraint.

The Government of the Sudan stated that it would let the Commission work freely, cooperate with its requests for information and not subject those who talked to Commission members to harassment. The Commission considered that the Government of the Sudan had been cooperative although some key documents were not made available.

The Commission recommended that the Council not only refer the situation in Darfur to ICC but also establish an international compensation commission to act on behalf of the victims. I do not believe the second recommendation has received the attention it deserves.

In March 2005, acting under Chapter VII of the Charter, the Security Council decided to refer the situation in Darfur to the Prosecutor of ICC.

Unfortunately, with that the collaboration of the Sudanese Government ended, and no concrete action was taken by the Security Council to ensure that the Sudan and other States arrest those for whom ICC — since 2007 — has issued arrest warrants. The Court has repeatedly told the Council that the Government of the Sudan is not cooperating with the Court. One could expect that the Council — as a minimum — ensure compliance with its own decisions, namely resolution 1593 (2005). Failing to do so only undermines the Council's authority and credibility.

My presentation would not be complete if I did not refer to a few initiatives from the Secretary-General in setting up fact-finding mechanisms. I believe there is a mixed track record here as well.

In 2009 the Council failed to address the situation in Sri Lanka in a serious manner, as some permanent members of the Council argued that there was no threat to international peace and security since the conflict was contained within Sri Lanka and had no spillover effect across its borders.

When no progress was made by Sri Lanka to pursue accountability, the Secretary-General appointed in June 2010 a Panel of Experts on Sri Lanka to advise him on accountability with regard to any alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka. The Secretary-General made the report public on 12 April 2011.

The mandate of the Panel of Experts did not extend to fact-finding or investigation and therefore fell short of what would have been required, but it did assess the nature and scope of alleged violations.[c] The Panel of Experts did not receive authorization from the Government of Sri Lanka to visit the country on the terms it requested. However, the Panel of Experts produced a strong, credible report, and for the first time an international body acknowledged the extent of human rights abuses committed in the last days of Sri Lanka's brutal conflict, when at least 10,000 civilians were killed. It found credible allegations of a wide range of serious violations of international humanitarian and human rights law by the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam, some of which could amount to war crimes and crimes against humanity.

[c] "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka", executive summary, p. i (31 March 2011).

The Panel of Experts recommended, among others, the establishment of an independent international mechanism with concurrent functions to monitor the domestic accountability process and conduct independent investigations.

The Secretary-General said in April 2011 he could initiate an investigation only with Sri Lanka's consent or a decision from Member States through an appropriate intergovernmental forum.[d]

The Panel also recommended a review of United Nations actions during the war in Sri Lanka, given its failure to take actions that might have protected civilians during the final stages of the war.

The Secretary-General never brought the Panel's report to the attention of the Security Council, and the Security Council never discussed its findings. After a great deal of pressure, the Secretary-General finally transmitted the Panel's report to the President of the Human Rights Council in September 2011. No further action has so far been taken.

The initiative of the Secretary-General on Sri Lanka initially provided the necessary flexibility when other United Nations bodies such as the Security Council and Human Rights Council failed to act, primarily due to political considerations. However, the example also shows its limits as the Secretary-General's initiative was not immune from political pressure either and requires follow up by other United Nations bodies to ensure concrete action is taken in addressing accountability for crimes under international law. The question is, therefore, whether the recent examples of initiatives led by the Secretary-General have the necessary teeth to ensure follow-up.

I would like to refer to another initiative by the Secretary-General to highlight a number of other potential risks.

The Secretary-General created a Panel of Inquiry in August 2010 which was given the task examining and identifying the facts, circumstances and context of the 31 May 2010 incident in which a convoy of humanitarian aid ships bound for Gaza was intercepted by Israeli forces, leading to the loss of life. The Panel of Inquiry was also asked to consider and recommend ways of avoiding similar incidents in the future. The Panel presented its report to the Secretary-General in September 2011.

The Panel of Inquiry on the flotilla incident was different from most other examples, including in terms of the scale of violations, as it was mandated to investigate only one specific incident. The Panel did not have the power to compel witnesses to testify and based its review on the Israeli and Turkish national investigations into the incident, which reached very different conclusions.

It is widely accepted that the aim of this Secretary-General initiative was largely political, namely to serve as a tool to facilitate a reconciliation between Turkey and Israel.

An international fact-finding mission, established by the Human Rights Council in June 2010 to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks

[d] Statement attributable to the Spokesperson for the Secretary-General on public release of Panel of Experts' report on Sri Lanka (25 April 2011). Available from http://www.un.org/apps/sg/sgstats.asp?nid=5222.

on the flotilla of ships, drew conclusions in its September 2010 report similar to those of the Panel of Inquiry with regard to the excessive use of force by the Israel Defense Forces.

However, between the two United Nations-initiated mechanisms, some of the other legal findings were different, and the flotilla incident therefore highlighted the risk of conflicting findings between different initiatives with overlapping mandates.

On the basis of the examples cited I would like to formulate a few concluding remarks:

Although the commissions of experts for Rwanda and the former Yugoslavia, and the International Commission of Inquiry on Darfur led respectively to the creation of international tribunals and the referral to ICC, there is no reason or need to sequence fact-finding mechanisms and judicial bodies. This could make the process more rigid and unduly delay truth and justice.

For example the Security Council referred the situation in Libya to ICC on 26 February 2011, whereas the Human Rights Council created the International Commission of Inquiry on Libya one day earlier during a special session. Both mechanisms are therefore running in parallel, which is not problematic as they have clearly distinct mandates and roles.

There are, unfortunately, also numerous examples where fact-finding mechanisms would have been able to contribute to establishing the truth, ensuring accountability and preventing further human rights violations but where the Council failed to take effective action due to political considerations.

Those examples include, for instance, the situation in Georgia in 2008, or in Somalia during the past two decades, where gross violations of international humanitarian and human rights law continue to be committed. The inaction of the Council to ensure accountability in Somalia is in sharp contrast with, for instance, Security Council initiatives on combating piracy, including by considering earlier this year the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court.

Calls for fact-finding missions to investigate violations of international humanitarian law committed by parties to the conflicts, including the United States, in Iraq and Afghanistan went also unheeded. The current inaction by the Council with regard to the situation in the Syrian Arab Republic is also embarrassing in the light of the scale and severity of human rights violations.

Finally, I would like to formulate a few recommendations for any fact-finding mechanism which is being established:

- Decide sooner rather than later to establish a fact-finding mechanism, bearing in mind the preventive role it could play, including as a deterrent for other situations
- Address the problem of selectivity as numerous other situations necessitate a fact-finding mechanism
- Strike a balance between speed and thoroughness of work

- Ensure extensive expertise among the members of the mechanism in human rights and international law; military and criminal justice investigators; weapons and ballistic experts; forensic experts; and experts in the protection of victims and witnesses, including women and children
- Formulate a comprehensive plan for ensuring that perpetrators are brought to justice, including by examining the capacity of the national justice system to do so and providing victims with access to truth, justice and reparation
- Propose a method of eradicating impunity and achieving full reparations for victims of the human rights abuses
- Make public the findings and recommendations within a reasonable period of time
- Ensure the fact-finding mechanisms are adequately resourced and do not rely only on a voluntary trust fund
- Ensure that such a mechanism has access to all relevant information and persons and has the possibility to summon witnesses
- All persons who provide information to the investigation should be protected from reprisals; ensure a proper witness protection programme
- Strengthen institutional memory and further develop research methodology tools/guidance
- And probably the most important, make sure the commitment is there to follow up on the recommendations of the fact-finding mechanisms.

Non-Security Council practice
Francesca Marotta, Chief, Methodology, Education and Training Section, Office of the United Nations High Commissioner for Human Rights

Investigative and fact-finding mechanisms mandated by entities other than the Security Council constitute another of the rich assortment of tools that provide the United Nations with means to tackle impunity for past human rights violations and also prevent future violations. In the brief time allocated to discuss this topic, it will not be possible to comprehensively cover the numerous mechanisms that have operated since the early 1990s. I will thus address general trends and issues, while referring to some specific examples from the rich United Nations practice in this field. My discussion will focus on the following:

- The variety and the value of these mechanisms to the aims of the United Nations
- Operational and methodological issues surrounding the work of commissions and missions
- Recurrent challenges and a number of lessons learned through OHCHR experience in supporting those bodies
- Areas for further engagement by the Security Council that would help to strengthen the efficacy of those mechanisms

A. The breadth and variety of United Nations experience, and the value of such diversity to address an ever-increasing number of situations

Commissions of inquiry and fact-finding missions have been established by the Secretary-General upon request by States or[e] other intergovernmental organizations such as ECOWAS.[f] They have also been established by the Human Rights Council,[g] its predecessor, the Commission on Human Rights[h] the General Assembly[i] and the United Nations High Commissioner for Human Rights[j] In some cases, the High Commissioner has acted at the request of United Nations offices or peace missions.[k]

The forms that they have taken are situation-specific, ranging from detailed and in-depth examinations of specific events to broader fact-finding assessment and mapping activities. They have been set up in response to allegations of international human rights and humanitarian law violations in conflict contexts[l] as well as in situations of high levels of violence, often but not exclusively related to electoral or political processes, involving serious violations of human rights law.[m]

OHCHR has over the years provided support and expertise to such mechanisms, whether originating from decisions of the Security Council, Human Rights Council or Secretary-General, Government requests or the High Commissioner's own initiatives. Undertaking or supporting investigative, fact-finding and assessment mandates for the purpose of ensuring accountability for human rights and IHL violations is as old as the history of OHCHR itself. It goes back to supporting the commissions of experts on Yugoslavia in 1993 and Rwanda in 1994 and the commissions of inquiry on Darfur in 2004 and Timor-Leste (1999 and 2006), and carries on to the present day in all regions of the world, with the more recent mandates on Guinea (2009), the Occupied Palestinian Territories and Southern Israel (2009), Sri Lanka (2010), Côte d'Ivoire (2011), Libya (2011), the Syrian Arab Republic (2011) and Yemen (2011), to mention only a few of the more than 30 such bodies we have been assisting. As

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[e] For example, the International Commission of Inquiry for Togo, established in 2000 and mandated to look into allegations of extrajudicial killings in 1998 raised in an Amnesty International report, followed a request by the Government of Togo to the Secretary-General of the United Nations and the Secretary-General of the Organization of African Unity.

[f] The International Commission of Inquiry on Guinea was set up by the Secretary-General of the United Nations in 2009 at the request of the Government of Guinea, ECOWAS and the International Contact Group-Guinea.

[g] For example, the International Commission of Inquiry on Libya, set up in February 2011 and currently ongoing.

[h] For example, the International Commission of Inquiry on East Timor, set up in 1999 to look into the post-vote violence.

[i] The General Assembly set up the Group of Experts for Cambodia in 1999 to examine requests for assistance in responding to past serious violations.

[j] For example, the High Commissioner fielded an OHCHR fact-finding mission to look into post-electoral violence in Kenya in 2007. In 2005, the High Commissioner dispatched a fact-finding mission on events in the city of Andijian, Uzbekistan.

[k] As is the case of various forensic and assessment missions to Afghanistan and the Democratic Republic of the Congo.

[l] Such as in relation to Sri Lanka, the Occupied Palestinian Territory, the Democratic Republic of the Congo and Lebanon.

[m] For example the Independent Special Commission of Inquiry for Timor-Leste set up at the request of the Government in 2006, the United Nations High Commissioner's assessment mission to Yemen in 2011 and the International Commission of Inquiry on Côte d'Ivoire set up by the Human Rights Council in 2011.

this partial listing shows, the trend towards an increased resort by the international community to commissions of inquiry and fact-finding missions in the context of accountability efforts is clear.

The work of these mechanisms is crucial for enhancing human rights protection in multiple ways. They can provide a historical record of serious violations of human rights and international humanitarian law and influence positive change in law and practice. Critically, they assist in ensuring accountability for serious violations, which is fundamental in order to deter future violations, promote compliance with the law and provide avenues of justice and redress for victims. Many of them have delved into the root causes of the violence and violations, triggering transitional justice mechanisms that address rights to the truth, justice, remedies and reparations, and guarantees of non-recurrence, and thus have informed more sustainable peacebuilding and reconciliation efforts and assisted in the political settlement of conflicts.

There should be no question that these mechanisms are central to much of the work of our Organization. Indeed, it is highly encouraging that we are all here today to look at how the Security Council can further its role in these mechanisms.

B. Operational and methodological issues surrounding the work of commissions of inquiry and fact-finding missions

Experience shows that there is no single format for how every commission of inquiry or fact-finding body is constituted and functions: the mandate, the situation of inquiry, the independent experts or members appointed, and the circumstances surrounding the body's establishment and conduct, will vary each time. However, the methodological tenets that guide human rights and IHL fact-finding and investigations, as developed on the basis of relevant norms and principles and through many years of practice, experience and learning, provide commonality and continuity to these different bodies, whatever their legislative authority, and ensure the production of sound analysis, reports and recommendations to inform international responses to crisis situations. All investigative bodies rely on the ability to independently, thoroughly, objectively, and impartially collect relevant information, confirm its veracity, and analyse it in order to reach credible findings about violations, their causes and effects, responsible institutions and perpetrators. To enable the commission/mission to carry out its mandate, terms of reference, investigative priorities and choice of sources need to be determined, which is done according to agreed criteria. The protection of witnesses, victims and other sources of information requires the application of rigorous methods, with approaches that need to be carefully adapted to the various contexts. Investigating sexual violence involves sensitivity, adequate expertise and understanding of the physical and psychosocial impact of this kind of abuse. Cogency in methodological frameworks and adherence to rigorous standards must be accompanied by the ability to adapt and respond to specific contexts and circumstances in a targeted manner. For example, uniquely, the United Nations fact-finding mission on the Gaza conflict[n] used public hearings as part of its investigative methodology to ensure an inclusive process, give a voice to the victims where they had not been heard, and support their rights to truth and justice.

[n] Set up by the Human Rights Council in 2009 in the wake of Operation Cast Lead.

Commissions of inquiry and fact-finding missions undertake complex investigations requiring legal, analytical, investigative, forensic, military, law enforcement, gender and witness protection expertise, in addition to often heavy security and logistical support. Their members need to be able to rely on adequate support structures with the necessary expertise. As an early example, in fulfilling its responsibility to provide technical and substantive expertise, OHCHR provided a secretariat of 30 staff to the Security Council-mandated International Commission of Inquiry on Darfur. Since then, OHCHR has developed the standing capacity to support all forms of mandated investigations. While ensuring effective and efficient responses to calls for support, our standing capacity has also enabled ongoing professionalization. We can increasingly draw on people with accumulated experience in supporting these bodies, in all substantive and technical areas required by their mandate. Our standing capacity also means we can ensure the ongoing refinement of the relevant operational and methodological frameworks through experience, practice and lessons learning.

C. Some recurrent challenges encountered by commissions of inquiry and fact-finding missions supported by OHCHR, and some of the lessons learned

1. Mandate and resources

The mandate is crucial for the success of a commission in fulfilling its task; the clearer the mandate, the greater the likelihood of success. The mandates of commissions/missions have variously included the establishment of facts and circumstances related to a single event,[o] or longer periods defined with varying degrees of precision.[p] The decision for a narrow or broad mandate no doubt depends on the circumstances leading to the establishment of each body, as well as the purpose intended to be achieved by the mandating authority. The terms of the mandate, however, necessarily impact on the time frame and resources required to fulfil it. Resources and reporting deadlines provided by the mandating authorities must thus be commensurate to the mandate. This has not always been the case. Also central to success is adequate funding. Commissions of inquiry and fact-finding missions are expensive. However, if we want to ensure their success, they must be properly funded.

Mandates have often required commissions of inquiry to identify and name alleged perpetrators of violations of international crimes, from Darfur (2004) to Timor-Leste (2006), Libya (2011), Côte d'Ivoire (2011) and the Syrian Arab Republic (2011). Clearly, this aspect of investigation mandates has potentially serious ramifications, including for due process and witness protection, and requires careful methodological approaches not to blur the lines with criminal justice processes. As clearly set out, for example, by the commissions of inquiry on Darfur

[o] For example, the Independent Commission of Inquiry on the events connected with the march planned for 25 March 2004 in Abidjan, the 2006 Independent Special Commission of Inquiry on Timor-Leste and the International Commission of Inquiry on Guinea in 2009, all mandated to investigate events spanning from one to a few days.

[p] For example, the mapping exercise undertaken by OHCHR in the Democratic Republic of the Congo covered a period of 10 years, from 1993 to 2003; the Panel of Experts on Sri Lanka reviewed the nature and scope of violations in the final stages of conflict; the United Nations Independent International Fact-Finding Mission on the Gaza Conflict was mandated to investigate violations before, during and after Operation Cast Lead; and the commissions of inquiry on Libya and the Syrian Arab Republic cover ongoing situations.

and Timor-Leste (2006), the mandate of such commissions does not require them to establish guilt in the way courts do. They rather are expected to gather a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. Recommendations to ensure accountability for perpetrators usually include prosecution in domestic or international courts, or further investigation.

2. Access and cooperation

Effectiveness is also dependent to a degree on the consent of the relevant State authorities. Fundamentally, consent will enable the commission to have access to persons, locations and documentation necessary to carry out its investigation. A challenge faced by several commissions and fact-finding and assessment missions has been the unwillingness of Governments, non-State actors or authorities that are the subject of investigation to cooperate. Lack of cooperation may vary from refusing to speak with and provide information and relevant documents to these bodies, to barring them from entering a country or the area where the incidents under investigation took place, to intimidating possible witnesses and sources of information to prevent them from cooperating with the investigators. To overcome these challenges, for example in the operation of the OHCHR Fact-Finding Mission to the Syrian Arab Republic (2011), the Panel of Experts on Sri Lanka and the Fact-Finding Mission on the Gaza Conflict and its follow-up expert committees, these bodies have resorted to visiting neighbouring countries to meet with persons who may have first-hand information on the events under investigation, inviting witnesses and victims to testify outside their country, relying more heavily on official statements and material in the public domain, as well as on informal contacts with individuals able to relay official positions. Lack of cooperation from authorities has not prevented investigations and fact-finding from taking place and reaching conclusions.

3. Protection of sources

The protection of witnesses, victims, and other persons cooperating with commissions/missions is a matter of continuing concern. Protection is the responsibility of all, from bodies mandating commissions of inquiry, to Governments whose actions are under investigation, to the commission's members and secretariat. OHCHR has developed operational guidelines based on experience and lessons learned, which include overarching guiding principles and concrete measures and options to integrate protection considerations into the entire cycle of a commission/mission's life. Witness protection was, for example, a paramount concern that guided OHCHR actions in assisting the commission to carry out its mandate in Guinea and led to numerous precautionary steps being taken. Following the completion of the field mission, OHCHR established a post-mission protection presence in Conakry for three months to provide support and advice to persons facing threats to safety and prevent reprisals against them. A similar practice had been followed by the Darfur Commission. This should, in our view, become a standard way of operating in situations that present risk of harm to persons who have provided information or otherwise cooperated with commissions/missions. In other cases, where OHCHR offices exist, commissions have recommended that the monitoring of the situations of persons who have cooperated with commissions,

after the expiry of their mandate, become part of OHCHR regular work in the country.

4. Interrelationship with judicial processes

Commissions/missions invariably operate in a broader context with other national and/or international judicial entities. This may require them to determine the nature of their relationship with the other entity. Especially where commissions/missions have conducted their investigations in parallel with other national and international judicial or investigative processes, it has been important to ensure they do not hamper those other processes but, where possible, assist them. While preserving confidentiality of sources, information can be shared with other investigative entities. In Rwanda, after the establishment of ICTR in 1994, human rights officers provided the Tribunal with an extensive report on human rights violations, which was an important tool from which the Tribunal's own investigations could begin.

Where parallel investigations are being undertaken, it is important to ensure full understanding of the role of each entity and the relationships between them. Established only one day before the referral by the Security Council of the situation in Libya to the International Criminal Court, the International Commission of Inquiry on Libya is operating in parallel to the Court's investigations. In its preliminary report, the Commission set out the similarities as well as the differences in mandates, noting in particular that while it had identified some violations that led it to conclude that international crimes were committed in Libya, it was the role of ICC to assess individual criminal responsibility.

5. Follow-up

The long-term impact of commissions/missions may be difficult to measure. However, it is clear that the degree of follow-up on the recommendations made by these commissions will fundamentally determine their effectiveness. OHCHR has been actively involved in the implementation of commission and mission recommendations in, for example, Timor-Leste, the Democratic Republic of the Congo, Côte d'Ivoire and Guinea, to name a few. Following the recommendation of the International Commission of Inquiry on Côte d'Ivoire this year, the Human Rights Council established the mandate of an independent expert on the situation of Côte d'Ivoire with the responsibility to assist the Government and other relevant actors in the implementation of the Commission's recommendations. The independent expert will assume his responsibilities from today, 1 November 2011. This month, OHCHR will also provide training to the commissioners of the Dialogue, Truth and Reconciliation Commission.

Following recommendations made by the International Commission of Inquiry for Guinea established by the Secretary-General, OHCHR opened a country office in Guinea with a mandate to monitor the human rights situation and assist with recommended reform of the judicial sector. Other initiatives have been undertaken recently: an interim National Reconciliation Commission was established in August 2011, and the Government of Guinea and the United Nations Peacebuilding Commission reached agreement in September on a joint strategy to promote national reconciliation and reform the security sector, among other things. It is also notable

that the ICC Prosecutor has initiated preliminary investigations into possible crimes against humanity.

In the Democratic Republic of the Congo, following the publication in 2010 of the mapping report (covering the most serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo between 1993 and 2003), the Government has initiated a process to establish a special court to prosecute international crimes, and OHCHR provided technical advice on the drafting of the relevant legislation.

Following the report of the International Commission of Inquiry on East Timor in 1999, UNTAET established a serious crimes unit and special panels for serious crimes to conduct investigations, prosecutions and judicial proceedings relevant to crimes against humanity and other serious crimes committed in East Timor.

Of course, the first use of Security Council referral under the Rome Statute (resolution 1593 (2005)), which resulted in the issuance of arrest warrants against two suspects, stemmed from the recommendation for referral made to the Security Council by the International Commission of Inquiry on Darfur.

D. Some areas for further engagement by the Security Council, with a view to enhancing the effectiveness of commissions of inquiry and fact-finding mechanisms

The Security Council has on several occasions and in various ways referred to the work of non-Security Council mandated commissions/missions. These links could be further developed, for example, in the following areas:

- The Security Council could systematically consider the reports of the commissions/missions where investigations have been carried out with respect to countries on its agenda. Most recently, the Council has referred, in its relevant resolutions, to the report and findings of the International Commission of Inquiry for Côte d'Ivoire established by the United Nations High Commissioner for Human Rights,[q] and has taken note of the Human Rights Council resolution on Yemen, which itself noted the report of the OHCHR human rights assessment mission to that country and underlined the need for a comprehensive, independent and impartial investigation into alleged human rights abuses.[r] Past practice has included the Council receiving reports produced by the 1999 Commission on Human Rights-mandated Commission of Inquiry on East Timor and the Human Rights Council-mandated Fact-Finding Mission on the Gaza Conflict (2009), and by the commissions of inquiry on Côte d'Ivoire (2004) and Guinea (2009) established by the Secretary-General.

- The Security Council could reinforce and aid the progression of the work of the commission/mission by requesting States and other relevant actors to cooperate during the investigation and, crucially, in the implementation of recommendations. It could also take steps to ensure the protection of persons who cooperate with the commission.

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[q] Resolution 2000 (2011).

[r] Resolution 2014 (2011).

- The Security Council could also have a role in prompting domestic action towards accountability for violations, by establishing mechanisms to monitor and report on the implementation of commission/mission recommendations by the State, especially the undertaking of investigations into violations according to international standards.

- Another highly important aspect of follow-up is reparations to victims of violations. The International Commission of Inquiry on East Timor, whose report was submitted to the Security Council, was the first to propose a reparations programme, noting that the basic human rights of the victims to justice, compensation and the truth must be fully respected. The Council could play a significant role in ensuring the establishment of reparations programmes in order to address the needs of victims.

- Finally, an issue that deserves further reflection is the relevance of reports and findings of commissions of inquiry and fact-finding missions to sanctions regimes. Of the 12 Security Council sanctions regimes, 5 include listing criteria related to violations of international human rights law and international humanitarian law, and in particular involving violations of the rights of children and women in conflict situations. In the context of possible imposition of sanctions for rape and other acts of sexual violence, the Council has called for relevant United Nations missions and United Nations bodies to share all pertinent information with the relevant Security Council sanctions committees. Targeted sanctions can be important tools to promote accountability, while it is important that both procedures of imposition and effects are consistent with international human rights standards.

Panel 3: reparations

The practice of the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission

Romesh Weeramantry, University of Hong Kong; formerly Legal Adviser, United Nations Compensation Commission

The focus of this presentation will be two relatively recent claims programmes: the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims Commission (EECC). A fundamental difference between the two lies in their origins: UNCC was established by the Security Council and EECC was created through a bilateral agreement between the Governments of Eritrea and Ethiopia. As the primary subject matter addressed by the current panel is the work of the Security Council in the area of reparations, you may wonder why I will discuss EECC, which is a body not directly related to the Council. By discussing EECC, I intend to provide a broader understanding on reparations programmes and relevant issues that the Council may need to consider should it decide to authorize or otherwise promote such programmes in the future. I will first deal with UNCC and thereafter turn to EECC. In my concluding remarks, I will offer a few suggestions on how the Council could approach reparations, particularly in the light of the lessons learned from UNCC and EECC.

United Nations Compensation Commission

The United Nations Compensation Commission was established to assess, process and pay out claims for compensation resulting from the 2 August 1990 invasion and occupation by Iraq of Kuwait. In response to the invasion, the Security Council adopted resolution 678 (1990) on 29 November 1990, which delivered an ultimatum for Iraq to withdraw from Kuwait.[s] The failure of Iraq to comply with this direction led to Security Council-authorized armed action against Iraq. Military operations were commenced by Allied forces against Iraq on 16 January 1991. Kuwait was liberated on 25 February 1991.

In the aftermath of Iraq's military defeat, the Council adopted resolution 687 (1991) on 3 April 1991, which held that Iraq was liable under international law for any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait (para. 16). As will be pointed out later, this finding on Iraq's State responsibility is based on its violation of the *jus ad bellum* (the prohibition on the threat or use of force in Article 2(4) of the Charter) rather than on *jus in bello* breaches (violations of international humanitarian law), which are the main focus of the EECC determinations.

In paragraph 18 of resolution 687 (1991), the Council decided to create a fund to pay compensation for claims that fell within paragraph 16 and to establish a commission that would administer the fund.[t] In paragraph 19, the Council directed the Secretary-General:

> to develop and present to the Security Council for decision, no later than thirty days following the adoption of the resolution, recommendations for the Fund to be established in accordance with paragraph 18 and for a programme to implement the decisions in paragraphs 16 to 18, including the following: administration of the Fund; mechanisms for determining the appropriate level of Iraq's contribution to the Fund, based on a percentage of the value of its exports of petroleum and petroleum products, not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the Fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16; and the composition of the Commission designated above.

[s] Paragraph 1 of resolution 678 (1990) required Iraq to comply fully with resolution 660 (1990) and all subsequent relevant resolutions. Those subsequent resolutions, as set out in resolution 678 (1990), were 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990 and 677 (1990) of 28 November 1990.

[t] The fund and commission were formally established by resolution 692 (1991).

The mechanism for the payment of compensation that was referred to in this resolution took shape only in 1995, when resolution 986 (1995) was adopted. That resolution permitted oil exports from Iraq under a scheme in which buyers of the oil would not make payments directly to Iraq but into an escrow account. In paragraph 8 of resolution 986 (1995), the Council decided that the funds in that escrow account should be deployed to finance the export to Iraq of medicine, health supplies, foodstuffs, and materials and supplies essential for civilian needs (often referred to as the "oil-for-food" programme), and to make other payments, including the costs of United Nations weapons inspections in Iraq. Additionally, the resolution provided that funds from the escrow account could be paid into a separate fund created to pay successful compensation claims (see para. 18 of resolution 687 (1991) above). However, this payment into a separate compensation fund was not to exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq.[u]

The valuation, verification, processing and payment of the compensation to be paid by Iraq were the essential tasks of UNCC, which is neither a court nor a tribunal. As will be recalled, the Council had already established Iraq's responsibility under international law for any direct loss, damage or injury as a result of its unlawful invasion and occupation of Kuwait under resolution 687 (1991), and UNCC was therefore spared the necessity of having to make such a determination.

The Commission received and processed 2.7 million claims for compensation, which in aggregate sought compensation in the amount of 352.5 billion United States dollars. Given the vast scope of the task entrusted to it, UNCC established 14 panels of Commissioners and each of these was assisted by the Commission's own secretariat (which included administrative staff, lawyers and even statisticians). Depending on the work required, external accountants and valuation experts were often retained by the Commission to perform certain valuation and verification tasks.

The essential functions of UNCC were overseen by a Governing Council, the membership of which mirrored the composition of the Security Council. This supervisory organ of UNCC established the criteria for compensability of claims, the rules and procedures for claims processing, the guidelines for the administration and financing of the compensation fund and the procedures for the payment of compensation. It also approved the recommendations of the panels of Commissioners and reported regularly to the Council on the Commission's work. Through the Governing Council, the Security Council in effect retained control over the UNCC claims process.[v]

To cope with the extraordinary number and diversity of claims, categories were created in order for appropriate techniques of claim analysis and determination to be applied. These categories assisted the division of the claims into more manageable blocks in terms of size and issues. Some examples of claims categories that compensated the violations of international humanitarian law and human rights suffered by civilians were category "A" claims, which related to people who were

[u] See paragraph 8 (c) of resolution 986 (1995); read with paragraph 2 of resolution 705 (1991). This percentage was reduced to 25 per cent by the Council in its resolution 1330 (2000) and to 5 per cent in its resolution 1483 (2003).

[v] The UNCC website (http://www.uncc.ch/) is still maintained and provides useful information on structure, work and decisions of the Commission.

forced to depart from Kuwait or Iraq as a result of Iraq's invasion and occupation of Kuwait and category "B" claims, which compensated people who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq's invasion and occupation of Kuwait.[w]

Depending on the claim category, different standards of proof were required. For example, a claim by a domestic worker had as its required threshold of proof a stamp in a passport or other travel document showing that he or she left Iraq or Kuwait during a certain period of time during Iraq's invasion and occupation. Once such evidence was shown, no further proof was required to be furnished for the common domestic worker claims (e.g., no proof of the loss of property or value thereof was required). Statistical methods derived the average amount that a normal domestic worker would have lost and this was used to arrive at lump-sum payments for the vast bulk of the domestic worker claims. Without such a streamlined (almost mechanical) evaluation method, the individual assessment of hundreds of thousands of domestic worker claims would have taken decades. The claims of companies and Governments, on the other hand, were dealt with on a more individual basis. Additionally, higher proof standards were employed for these claims. Consequently, the determination of these claims (per head) was more time-intensive.

At the conclusion of the work of all the UNCC panels of Commissioners in June 2005, 1.55 million claims (out of 2.69 million) were determined to have been successful. Consequently, $52 billion was approved for payment from the escrow account. Although this number is vast, it represented only 15 per cent of the amount that in aggregate was claimed against Iraq (i.e., $352 billion). As at January 2012, $35 billion had been paid. This payment has been made via States to their nationals who presented claims determined by the Commission to be compensable. Those States were entitled to levy a nominal administrative charge for their administrative costs but then the remainder of the compensation paid has been received by the claimants.

Currently, Iraq still pays compensation from its oil revenues, but the Security Council, in its resolution 1483 (2003), reduced the level of proceeds of all export sales of Iraqi petroleum, petroleum products and natural gas Iraq must deposit into

[w] The following is a full list of the specific categories:
- Category A claims — for departure from Iraq or Kuwait
- Category B claims — for serious personal injury or death
- Category C individual claims — for damages up to $100,000
- Egyptian workers' claims
- Category D individual claims — for damages over $100,000
- E1 oil sector claims
- E2 claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims
- E3 non-Kuwaiti construction/engineering claims
- E4 Kuwaiti private sector claims, excluding oil sector claims
- E/F export guarantee and insurance claims
- F1 Government claims — for losses related to departure and evacuation costs or damage to physical property, and claims filed by international organizations
- F2 claims — submitted by the Governments of Jordan and Saudi Arabia, excluding claims for environmental damage
- F3 claims — filed by the Government of Kuwait, excluding claims for environmental damage
- F4 claims — for environmental damage and depletion of natural resources.

the compensation fund to 5 per cent. That resolution terminated the "oil-for-food" programme within six months of the date of its adoption.

Eritrea-Ethiopia Claims Commission

The Eritrea-Ethiopia Claims Commission, although determining thousands of claims as a result of the war between Ethiopia and Eritrea at the turn of this century, resembled an arbitration rather than a claims processing body (as was the UNCC).[x] As noted above, it was not the creation of the Security Council, but the progeny of an agreement between Eritrea and Ethiopia.[y] According to the Agreement, the parties agreed to establish EECC. The jurisdictional mandate of EECC is set out in article 5 (1) of the Agreement:

> Consistent with the Framework Agreement,[z] in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

As is evident from the above provision, and in contrast to UNCC, the violations that were to be determined by EECC did not focus on the *jus ad bellum*, but rather on international humanitarian law (or *jus in bello*).

Much like in an arbitration, the EECC Commissioners were appointed by the two States with a president to be agreed upon. In total, EECC was comprised of a single panel of five Commissioners. In contrast, the Commissioners at UNCC were not directly appointed by the parties making claims before UNCC but by the Governing Council. From its commencement in 2001 through 2009, 17 separate awards were issued by EECC, which found both Eritrea and Ethiopia liable for

[x] The website of the Permanent Court of Arbitration (http://www.pca-cpa.org) provides an extensive source of EECC materials, including its awards.

[y] Agreement between the Government of Ethiopia and the Government of Eritrea signed in Algiers on 12 December 2000.

[z] Organization of African Unity Framework Agreement and the Modalities for its Implementation, endorsed by the 35th ordinary session of the Assembly of Heads of State and Government, held in Algiers, from 12 to 14 July 1999.

numerous violations of international law.[1] There is little public information available as to how EECC is financed.

At the end of the merits phase of its proceedings, EECC determined that Eritrea was responsible to pay compensation to Ethiopia for the following, most of which are violations of international humanitarian law (*jus in bello*):

(a) Intentional killings, beatings, abductions, disappearances, forced labour and conscription of Ethiopian civilians;

(b) Failing to impose effective measures to prevent the rape of Ethiopian women and girls;

(c) Looting by Eritrean soldiers from private homes, businesses and other entities;

(d) Damage to Ethiopian civilian housing, public buildings, infrastructure, religious institutions and other property;

(e) Deaths and injuries, medical expenses and property damage resulting from the dropping of cluster bombs;

(f) Looted equipment and lost profits of companies;

(g) Unlawful treatment of Ethiopian prisoners of war, including killings, beatings and refusing ICRC delegate visits;

(h) Failing to protect Ethiopian civilians in Eritrea from threats and violence;

(i) Failing to ensure Ethiopian civilians in Eritrea access to employment and medical care;

(j) Wrongful detention, abusive treatment in Eritrean jails and inhumane treatment and poor standards of food and accommodation in detention camps;

(k) Failing to protect the property of Ethiopians expelled from Eritrea;

(l) Failing to ensure safe and humane repatriation of Ethiopians departing Eritrea;

(m) *Jus ad bellum* violations.

Conversely, EECC required Ethiopia to compensate Eritrea for the following, the vast majority of which again are based on international humanitarian law (*jus in bello*):

(a) Eritrean civilian residential and business property losses resulting from looting or other damage;

(b) Destruction, looting and stripping of public, religious or commercial buildings or property;

(c) Mistreatment of Eritrean prisoners of war;

(d) Detention of Eritrean civilians under harsh and unacceptable conditions;

(e) Forcible expulsion of residents of an Eritrean town;

[1] Article 5 (12) of the Agreement ambitiously required EECC to finish its work by 12 December 2004.

(f) Unlawful expulsion from Ethiopia of civilians that had Ethiopia-Eritrea dual nationality;

(g) Depriving Ethiopia-Eritrea dual nationals present in third countries of their Ethiopian nationality;

(h) Expenses incurred by Eritrea in receiving, caring for and resettling rural Ethiopian nationals wrongfully expelled from Ethiopia;

(i) Failing to provide humane and safe conditions of transportation to persons expelled from Ethiopia to Eritrea;

(j) Losses relating to property located in Ethiopia and owned by Eritreans not residing there or civilians expelled from Ethiopia;

(k) Failing to return or compensate Eritrea for vehicles Ethiopia requisitioned from non-resident Eritreans during the war.

After the merits phase, EECC turned its attention to the difficult task of assessing the damages and putting a dollar value on the amount of compensation to be paid. Eritrea filed claims seeking a total of $6 billion. It was awarded $163,520,865. Ethiopia sought a far greater amount, $14.3 billion, partly due to its claim for massive damages for Eritrea's *jus ad bellum* violations. In this determination of a *jus ad bellum* violation, Eritrea was held responsible for a breach of Article 2(4) of the Charter for its armed attack on Ethiopia in May 1998. The decision caused some controversy, as some commentators have argued that EECC did not have the jurisdiction to make such a finding. Ultimately, Ethiopia was awarded $174,036,520.

Unlike UNCC, where the greater portion of compensation awarded has been paid to successful claimants, it has been well over two years since the EECC claims process was completed, but still no compensation has been paid. One may speculate that some form of settlement may take place between the countries in which simply the difference between the aggregate awarded amounts to each side, that is $10 million, will be paid by Eritrea to Ethiopia. The major problem with this potential outcome is that the persons who suffered the violations on which the claims were based are unlikely to receive any compensation. This leaves a large question mark over the whole process. Why go to such expensive and painstaking means of calculating compensation when nothing will eventually make its way to the victims of the Commission-determined breaches of international law? After all, most of the compensation, although to be paid directly to the two States, was based on the losses and injuries suffered by individual civilians.

Some conclusions

I would like to commence this conclusion by stating that — and this is a point that is frequently overlooked — the Security Council has been responsible for establishing and overseeing a major reparations programme that has resulted in the direct payment of compensation in respect of over 1.5 million claims. Therefore, the role of the Council in providing compensation to victims of international law breaches can be workable and effective. Nonetheless, UNCC seems to be an exceptional example where all members of the Council could reach agreement, and, possibly even more importantly, a mechanism for ensuring funds for the payment of the compensation was established as a result of the ability of the United Nations to

control Iraq's oil exports. EECC, on the other hand, shows that payment and enforcement mechanisms of third-party determination of mass claims may prove a considerable problem. However, it should be kept in mind that Eritrea and Ethiopia are two of the poorest countries in the world. In any event, the effective payment of compensation awards made by any mass claim reparation programme must therefore be at the forefront of the minds of its planners.

Should the Security Council in the future create a reparations programme relating to an attack by one country against another, some consideration needs to be given to the approach taken in resolution 687 (1991) as to the framing of Iraq's international responsibility. That decision of the Council was effectively made by reference solely to the *jus ad bellum*. It does not speak of violations under the *jus in bello*, which would have engaged Iraq's responsibility under international humanitarian law and human rights law. This legal basis of responsibility may have been more appropriate in a significant number of cases, as many of the UNCC claims appeared to be factually more connected with *jus in bello* violations. For example, a considerable number related to death, torture, personal injury, mental pain and anguish, hostage-taking, and loss and damage to real and personal property. This connection was in one instance recognized by the Governing Council in its Decision 11, "Eligibility for Compensation of Members of the Allied Coalition Armed Forces".[2] In that Decision, and although members of the Allied Coalition forces were expressly excluded from UNCC jurisdiction, compensation was permitted for prisoner of war claims by Allied Coalition troops for loss or injury resulting from mistreatment in violation of international humanitarian law. On this point, the findings of EECC on *jus in bello* violations and its valuation of the resulting damages may be instructive for any future UNCC-type Security Council reparations activity.

Another issue raised by the making of reparations is that while it involves international law and the ascertainment of its breach(es), perhaps more importantly, it involves the assessment of damages and the identification or earmarking of funds to pay the compensation to be awarded. This requires the expertise of specialists, such as accountants, actuaries and valuers, and the issues that arise can be extremely complex: for example, what monetary value is to be placed on rape or the violation of prisoner's rights or the valuation of a company whose records have been destroyed? The extensive practice of both UNCC and EECC would be of considerable assistance in these areas.

The final point I would like to make is that whenever there is a violation of international law, the question of reparations will arise in the overwhelming majority of cases. The Security Council thus will almost certainly face the need to consider the issue of reparations in the future. To be prepared for this eventuality, it would be worthwhile to appoint a special rapporteur to prepare a study that draws on lessons learned from UNCC, EECC and other claims programmes. The Council, through the work of the rapporteur, would therefore have already done its groundwork before the event and will be able to be more swift and sure in its actions when a situation gives rise to calls for reparations. This study could also include an examination on how to locate, liquidate, administer or otherwise make available sources of funds for compensating victims and also provide guidelines on valuing and verifying the amount of compensation owed to them. Such a study would be of

[2] S/AC.26/1992/11; available from http://www.uncc.ch.

use not only for the Security Council but also for domestic reparations commissions that may be contemplated in the future. This will relieve domestic reparations programmes from having to expend time and money to "reinvent the wheel" each time they are set up.

Non-Security Council practice: Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina; Housing and Property Claims Commission in Kosovo

Julien Piacibello, Humanitarian Affairs Officer, Office for the Coordination of Humanitarian Affairs

A. Introduction

The importance of national legal frameworks and specific mechanisms for ensuring individuals' access to reparation

In the absence of appropriate national legal frameworks and reparation mechanisms, individuals' claims for redress for violations of international humanitarian law have generally been rejected by national courts. While the obligation of States to make reparation for violations of international law is recognized as a general principle[3] — manifestations of which can be found in specific provisions of international humanitarian law instruments[4] — the recognition of States' direct liability vis-à-vis individuals for violations of international humanitarian law has met with legal — both substantive and procedural — obstacles.[5]

On a substantive ground, national jurisdictions have opposed to claimants one or more of the following arguments: first, the right to reparation as found in international humanitarian law is not self-executing, only home States of the victims

[3] Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity)* case (Germany vs. Poland), (Merits), PCIJ (Ser. A) No. 17, 1928, p. 29. See also article 31 of the articles on the responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83 of 12 December 2001 (International Law Commission), which states: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

[4] See article 3 of the Convention (IV) respecting the Laws and Customs of War on Land (The Hague, 1907): "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation"; article 91 of Protocol I to the 1949 Geneva Conventions (1977): "A party to the conflict which violates the provisions of the Conventions or of this Protocol ... shall be responsible for all acts committed by persons forming part of its armed forces"; article 38 of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict: "No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation".

[5] See, e.g., Emanuela Gillard, "Reparation for violations of international humanitarian law", *International Review of the Red Cross*, September 2003, vol. 85, No. 851; Rainer Hofmann, "Compensation for victims of war — substantive issues — do victims of armed conflicts have an individual right to reparation?", intervention at the 2006 Toronto Conference of the International Law Association on Compensation for Victims of War. For an historical overview, see Rainer Hofmann and Frank Riemann, "Compensation for victims of war — background report", *International Law Association*, 17 March 2004.

being directly entitled to this right;[6] second, a peace agreement exists that precludes individual claims. On a procedural ground, national jurisdictions have referred to the principle of State immunity to reject their competence (*ratione materiae*) for claims grounded on acts committed by another State during wartime, to the extent that these acts constitute acts of sovereign power (*acta jure imperii*).[7]

Although increasingly challenged by scholars and international bodies, including international and national jurisdictions,[8] these legal arguments still largely correspond to the *lex lata* of international humanitarian law. Moreover, would the existence of an individual right to directly obtain reparation for violations of international humanitarian law be recognized in the international legal order, subsidiary and crucial questions — such as the definition of the victim[9] or the existence of an obligation to make reparation for non-State armed groups — as well as practical obstacles — such as the capacity of national legal systems to deal with the consequences of large-scale hostilities on an individual basis — would still jeopardize the implementation of this right. This highlights the importance of adapting national legislation and establishing special procedures to give individuals effective access to reparation for violations of international humanitarian law or, more broadly, for harm and losses suffered in relation to a situation of armed conflict. This preoccupation is reflected in the Basic Principles and Guidelines on

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[6] See, e.g., Bundesverfassungsgericht (BVerfG — Federal Constitutional Court), 2 BvR 1476/03 (15 February 2006), available from http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html, and the analysis by Markus Rau, "State liability for violations of international humanitarian law — the Distomo case before the German Federal Constitutional Court", *German Law Journal* No. 7 (2006), available from http://www.germanlawjournal.com/index.php?pageID=11&artID=743; concerning the practice of German courts on claims grounded in violations of international humanitarian law during World War II, see also BVerfG 94, 315.

[7] See, e.g., Shuichi Furuya, "Compensation for victims of war — procedural issues — State immunity: an impediment to compensation litigation — assessment of current international law", intervention at the 2006 Toronto Conference of the International Law Association on Compensation for Victims of War.

[8] On the growing recognition of an individual right to reparation for violations of international humanitarian law, see, e.g., Rainer Hofmann, "Reparation for victims of armed conflict — substantive issues", comments on the articles of the draft declaration of international law principles on reparation for victims of armed conflict, 2010 Hague Conference of the International Law Association on Reparation for Victims of Armed Conflict (especially comments under article 6, "Right to reparation"). For a criticism of the applicability of the principle of State immunity for violations of international humanitarian law (concluding that the principle is still relevant *de lege lata* despite recent evolutions), see Shuichi Furuya, "Compensation for victims of war — procedural issues — State immunity: an impediment to compensation litigation — assessment of current international law", intervention at the 2006 Toronto Conference of the International Law Association on Compensation for Victims of War, footnote 5.

[9] As pointed out by Emanuela Gillard ("Reparation for violations of international humanitarian law", note 3), should the recognition of the position of a victim be conditioned by the characterization of a violation of international humanitarian law as a source of loss, this would lead to situations whereby certain losses caused by hostilities in a situation of armed conflict would give rise to a right to reparation, while other comparable losses would not, depending on factual circumstances. To avoid such situations, the author suggests that the right to reparation be recognized to all victims of *jus ad bellum*, or to all persons adversely affected by conflict. In contrast, Rainer Hofmann and Frank Riemann note that extending the right to reparation to victims of *jus ad bellum* would leave citizens of the State who violated the *jus ad bellum* unprotected ("Compensation for victims of war — background report", *International Law Association*, 17 March 2004).

the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in December 2005.[10] Without creating any new international obligation, this non-binding instrument reiterates States' obligation to ensure respect for and implement international humanitarian and human rights law through national legislation, and focuses on the role of States in making available adequate, effective, prompt and appropriate remedies, including reparation, to victims.

Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance[11] was largely influenced by the Basic Principles and Guidelines. In a note, Theo Van Boven, the former Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, referred to this provision as being more elaborate and specific about the victims' right to obtain reparation than any previous international human rights treaty.[12] Article 24 requires parties to ensure that a national legal framework guarantees the victims' right to obtain prompt, fair and adequate compensation and, as appropriate, other forms of reparation enumerated in the Basic Principles and Guidelines.[13]

B. The development of ad hoc reparation mechanisms as a partial remedy to harm and losses related to a situation of armed conflict

Ad hoc mechanisms allowing individuals to obtain various forms of reparation for harm and losses caused by a situation of conflict have been established with increasing frequency, either via treaty,[14] by the Security Council[15] or unilaterally by States.

It has been argued that, considering the above-mentioned obstacles to the direct implementation by national courts of an individual right to reparation that would be enshrined in international humanitarian law, such ad hoc mechanisms

[10] Resolution 60/147.

[11] General Assembly resolution 61/177, adopted on 20 December 2006; entered into force on 23 December 2010; 90 signatories and 30 parties as at 31 October 2011.

[12] Theo Van Boven, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations Audiovisual Library of International Law (2010). Available from http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

[13] They include the following: restitution (restoration of the original situation before the violation occurred); satisfaction (covers non-material injury that amounts to an affront to the injured State or person); rehabilitation (medical/psychological care, social services); and guarantees of non-repetition.

[14] As for example, the Agreement signed in Algiers in December 2000 between Ethiopia and Eritrea set up a claims commission to decide through binding arbitration all claims, including individuals' claims, for loss, damage or injury caused by violations of IHL during the conflict.

[15] The first of which was probably the United Nations Compensation Commission, created in 1991 by Security Council resolution 687 (1991) to compensate losses arising as a direct result of Iraq's invasion and occupation of Kuwait.

might represent the most appropriate way of bringing justice to victims.[16] However, it should be noted that ad hoc reparation mechanisms only contribute to this goal by allowing victims to obtain some specific forms of reparation: They generally do not make determination as to the existence of a violation of international humanitarian law and, in any case, they do not make decisions on individual criminal responsibilities and States' liability.[17] Their activity thus covers one aspect only of what would be a comprehensive post-conflict justice process.

C. The examples of Bosnia and Herzegovina and Kosovo

I will briefly outline two quasi-judicial mechanisms, both set up in the former Yugoslavia to adjudicate individuals' claims to property or occupancy rights in the wake of a situation of armed conflict:

(a) The Commission for Real Property Claims of Displaced Persons and Refugees (hereafter "Commission for Bosnia and Herzegovina") set up by article VII of annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton, November 1995);[18]

(b) The Kosovo Housing and Property Claims Commission (hereafter "Commission for Kosovo") set up by UNMIK regulation 1999/23 of 15 November 1999, replaced in March 2006 by the Property Claims Commission (UNMIK regulation 2006/10, as superseded by regulation 2006/50), which operates since December 2008 under a law passed by the Assembly of Kosovo (Law No. 03/L-079, amending UNMIK regulation 2006/50).

Both Commissions marked innovative approaches to property reparation in that they were full-time quasi-judicial bodies giving individuals the right to file claims directly; and both were given jurisdiction over identified categories of claims originating from a situation of ethnic discrimination and conflict, in contexts where exacerbated tensions between communities and weakened judicial systems would have prevented an impartial functioning of justice.[19]

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[16] Markus Rau, "State liability for violations of international humanitarian law — the Distomo case before the German Federal Constitutional Court", *German Law Journal*, No. 7 (2006), available from http://www.germanlawjournal.com/index.php?pageID=11&artID=743; see also Rainer Hofmann, "Compensation for victims of war — substantive issues — do victims of armed conflicts have an individual right to reparation?", intervention at the 2006 Toronto Conference of the International Law Association on Compensation for Victims of War.

[17] Claims before these bodies must generally be grounded on a loss directly related to a situation of conflict — there is no need to characterize a violation of IHL (with the notable exception of the Eritrea-Ethiopia Claims Commission). However, as noted by Emanuela Gillard ("Reparation for violations of international humanitarian law", note 3), in practice, many of the losses and claims may arise from violations of IHL.

[18] The mandate of the Commission expired in December 2003.

[19] The composition of the Commissions for Bosnia and Herzegovina and for Kosovo was designed to guarantee their impartiality. The Commission for Bosnia and Herzegovina was composed of nine members, four of whom were appointed by the Federation of Bosnia and Herzegovina and two by the Republika Srpska; the remaining members were appointed by the President of the European Court of Human Rights. The Commission for Kosovo consisted of one local and two international members appointed by the Special Representative of the Secretary-General; the Chair was one of the international members.

1. Mandates and powers of the Commissions

Scope of the mandates

The scope of the mandate of the Commission for Bosnia and Herzegovina was particularly broad. Article XI of annex 7 of the Dayton Peace Agreement provides that the Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not now enjoy possession of that property. That formulation does not require the claimant to establish that the alleged dispossession was caused by conflict, nor does it provide for a deadline for the submission of claims — although an implicit deadline existed inasmuch as the Commission was originally mandated for a limited period of five years, later extended by an additional two years.

The Commission for Kosovo was originally mandated in 1999 to decide three types of claims, related not only to the armed conflict but also to the complex history of ethnic discrimination in the region.[20] Its competence was redefined in March 2006 by UNMIK regulation 2006/50, which mandated the Commission for Kosovo to resolve claims directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999 in respect of private immovable property, including agricultural and commercial property. The deadline for submitting claims expired on 3 December 2007, with claims filed after that date falling under the jurisdiction of the Kosovo courts.

Investigations and proceedings

The Commission for Bosnia and Herzegovina established its own rules and regulations on the basis of its mandate, including a time frame for the filing of every type of claim. The claims could be examined even in the absence of written evidence submitted by the claimant, who had only to establish his/her identity and legal interest during an interview. The Commission then initiated verification procedures and evidence collection. For this purpose, it was given wide-ranging powers, including unrestricted access to all property records in Bosnia and Herzegovina. To resolve property claims falling under its competence, the Commission was vested with the authority to declare invalid any property transfer which was made under duress, or that was otherwise in connection with ethnic cleansing.[21]

The Commission for Kosovo observed a similar procedure, described as "inquisitorial in nature" in its end of mandate report (see footnote 25), also based on interviews with claimants and thorough investigations. These investigations were

[20] The Commission had jurisdiction over the following claims: section 1.2 (a) of UNMIK regulation 1999/23: claims by natural persons whose ownership, possession or occupancy rights to residential property were revoked after 23 March 1989 on the basis of discriminatory legislation (involved almost exclusively former Kosovo Albanians); section 1.2 (b) of UNMIK regulation 1999/23: claims by natural persons who entered into informal transactions of residential property after 23 March 1989; and section 1.2 (c) of UNMIK regulation 1999/23: claims by natural persons who were the owners, possessors, or occupancy right holders of residential real property prior to 24 March 1999, who did not enjoy possession of the property and where the property had not voluntarily been transferred (involved almost exclusively minorities, mostly Kosovo Serbs).

[21] Article XII, para. 3 of annex 7 to the Dayton Peace Agreement.

conducted by the Housing and Property Directorate — a body created by UNMIK regulation 1999/23 to, inter alia, collect claims, try to mediate disputes before submission to the Commission and provide the latter with administrative and legal support.[22] Both the Commission and the Directorate were given free access to any and all records in Kosovo,[23] and the Commission had the legal authority to conduct searches ex officio and obtain evidence relevant to a claim from any record held by a public body, corporate or natural person.[24]

Both Commissions insisted on the importance of these extensive powers of investigation in contexts where local practices had prevented the constitution of complete property records and where conflict had led to the destruction of a substantial proportion of existing records.[25]

Decisions: restitution rather than compensation

In practice,[26] both Commissions made findings as to real property rights for the purpose of restitution rather than awarding compensation, in line with the political will of privileging the return of the persons who had been displaced as a result of ethnic discrimination and hostilities to their places of origin over other durable solutions.[27]

Authority of the Commissions' decisions

Contrary to the Commission for Bosnia and Herzegovina, which represented an alternative to existing local judicial and administrative remedies, the Commission for Kosovo had exclusive jurisdiction over the categories of claims that fell under

[22] See section 1 of UNMIK regulation 1999/23.

[23] See section 2.4 of UNMIK regulation 1999/23 and section 10.2 of UNMIK regulation 2000/60.

[24] Section 10.2 of UNMIK regulation 2000/60.

[25] See the Commission for Real Property Claims of Displaced Persons and Refugees, "End of mandate report (1996-2003)", available from http://www.pict-pcti.org/publications/Bibliographies/EMR-Part1-CoverExec1-Summary-EMR.pdf; and "Final report of the Housing and Property Claims Commission" (2007), available from http://www.pca-cpa.org/showfile.asp?fil_id=626.pdf.

[26] The Commission for Bosnia and Herzegovina had the legal authority to grant compensation upon simple request by the claimant, including in situations where property had been damaged or destroyed (article XI of annex 7 to the Dayton Peace Agreement states that claims may be for return of the property or for just compensation in lieu of return). However, the trust fund provided for by article XII of annex 7 to the Agreement in order to finance a compensation scheme was never adequately funded, and the option of compensation remained unimplemented.

In the case of the Commission for Kosovo, compensation could be ordered only in the specific situation described in sections 3.3 and 4 of UNMIK regulation 2000/60, whereby a holder of occupancy or property rights revoked on an ethnic basis claimed restitution while the ownership of the property had in the meantime been legally acquired by a natural person. The Commission for Kosovo did not have jurisdiction to award compensation for damage to or destruction of residential property, as section 2.6 of UNMIK regulation 2000/60 expressly prescribed that the Commission shall not receive claims for compensation for damage to or destruction of property.

[27] Chapter I of annex 7 to the Dayton Peace Agreement is entirely dedicated to the right to return (proclaimed by article I.1. of the annex) and to its implementation, and does not mention any other durable solution; similarly, Security Council resolution 1244 (1999) establishing UNMIK mentions only the objectives of establishing a secure environment in which refugees and internally displaced persons can return home in safety (para. 9 (c)) and assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo (para. 11 (k)).

its mandate. However, local courts retained jurisdiction to adjudicate any legal issue not decided by the Commission, and the Commission referred to local courts those issues which were connected to a claim but were not within its own jurisdiction.[28]

While it was provided that the decisions of both Commissions were legally binding in national courts and shall prevail over inconsistent findings of those courts as well as those of local administrations, there were numerous instances in which the Commissions' competency and decisions were disregarded by national authorities.[29]

Implementation of the Commissions' decisions

One of the main differences between the two Commissions is that, while the Commission for Kosovo had exclusive jurisdiction to evict people illegally occupying property and ensure their removal, for the purpose of which it could rely on the UNMIK police and the Kosovo Police Service, the implementation of the decisions of the Commission for Bosnia and Herzegovina relied on the national enforcement bodies placed under the authority of the parties to the Dayton Peace Agreement. Despite the latter's obligation to cooperate with the work on the Commission and respect and implement its decisions expeditiously and in good faith,[30] the lack of clear enforcement mechanisms for the decisions of the Commission for Bosnia and Herzegovina represented a major obstacle to its efficiency, until a law on the implementation of those decisions in Bosnia and Herzegovina was passed in October 1999.[31]

More generally, in spite of the extensive powers given to both Commissions, the role of other national and municipal authorities remained crucial in the ability of these Commissions to carry out their mandate, and represented significant obstacles to the enforcement of their decisions.

2. Successes and challenges

Observers of the functioning of the two Commissions have underlined the lack of an effective compensation scheme and the focus on restitution,[32] which can be criticized both from a transitional justice and from a humanitarian perspective. From a transitional justice perspective, the absence of an alternative to restitution leads to

[28] UNMIK regulation 1999/23, section 2, article 2.5.

[29] On Kosovo, see Edward Tawil, "Property rights in Kosovo: a haunting legacy of a society in transition", International Center for Transitional Justice, Occasional Paper (February 2009); more specifically on the practice of local courts, see OSCE, Department of Human Rights and Communities, Legal System Monitoring Section, "Conflicting jurisdiction in property disputes, monthly report, April 2009"; on Bosnia and Herzegovina, see the "End of Mandate Report (1996-2003)" of the Commission for Real Property Claims of Displaced Persons and Refugees, available from http://www.pict-pcti.org/publications/Bibliographies/EMR-Part1-CoverExec1-Summary-EMR.pdf; and Leopold Von Carlowitz, "Settling property issues in complex peace operations: the CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo", *Leiden Journal of International Law*, No. 17 (2004).

[30] Annex 7 to the Dayton Peace Agreement, article VIII.

[31] Commission for Real Property Claims of Displaced Persons and Refugees, "End of mandate report (1996-2003)", footnote 23.

[32] See Commission for Real Property Claims of Displaced Persons and Refugees, "End of mandate report (1996-2003)", especially annex B. Available from http://www.pict-pcti.org/publications/Bibliographies/EMR-Part2-Annexes-B-G.pdf.

an unfair situation whereby reparation is granted only to those victims whose property was not damaged or destroyed.[33] From a humanitarian perspective, no restitution mechanism is sufficient in itself to achieve the political objective of mass returns of displaced persons to their place of origin; there is a need, not only to address other critical issues — such as reconciliation, the provision of basic services and the restoration of security conditions conducive to return — but also to consider the full range of durable solutions, the achievement of which could be facilitated by a consistent financial compensation scheme.[34]

Assessing the Commissions' achievements more narrowly — exclusively against their mandate — leads to more positiv conclusions. According to its end-of-mandate report, the Commission for Bosnia and Herzegovina adopted some 311,000 final and binding decisions confirming property rights by the end of its mandate in December 2003, and close to 80 per cent of the Commission's decisions on residential property had been implemented.[35] This contributed to the restitution of property to approximately 1 million displaced persons. Bosnia and Herzegovina is today considered by observers as the first example of a successfully implemented large-scale process of property restitution in the aftermath of a full-blown conflict.[36] Although the activity of the Commission for Kosovo met with more limited success, as at December 2007, it had decided over 29,000 property disputes, and 98.5 per cent of its decisions had been implemented.[37]

However, the examples of those Commissions also show the challenges faced by quasi-judicial commissions in their ability to provide effective reparation. It is of particular interest to note that, in its end-of-mandate report, the Commission for Bosnia and Herzegovina underlined that its work began to have effect only with active lobbying to pass executing domestic legislation obliging municipal housing bodies to implement its decisions.

In Kosovo, while the Commission had more power to implement its decisions, challenges arose from a number of national and local stakeholders, including local administrations in Serbia, who denied access to cadastral registers until the signing of an agreement on 2 December 2002; administrative and other local law enforcement personnel, who showed extreme reluctance to prevent the

[33] See Rhodri C. Williams, "The contemporary right to property restitution in the context of transitional justice", International Center for Transitional Justice, Occasional Paper (May 2007), noting that in displacement contexts, the association between restitution of homes and return of those displaced from them tends to guarantee support for restitution from both domestic actors and host countries interested in sustainable repatriation of refugees. A consequent risk is that restitution programmes, having developed a higher profile than broader reparations programmes, may supplant them, arbitrarily privileging victims whose suffering took the form of dispossession of recoverable assets.

[34] See Rhodri C. Williams, "Post-conflict property restitution in Bosnia: balancing reparations and durable solutions in the aftermath of displacement", intervention at the TESEV International Symposium on Internal Displacement in Turkey and Abroad, held in Istanbul, from 4 to 5 December 2006; and "The contemporary right to property restitution in the context of transitional justice", International Center for Transitional Justice, Occasional Paper (May 2007).

[35] Commission for Real Property Claims of Displaced Persons and Refugees, "End of mandate report (1996-2003)", footnote 23.

[36] Rhodri C. Williams, "The contemporary right to property restitution in the context of transitional justice", International Center for Transitional Justice, Occasional Paper (May 2007).

[37] "Final Report of the Housing and Property Claims Commission" (2007). Available from http://www.pca-cpa.org/showfile.asp?fil_id=626.

re-occupation of property by those who had been evicted pursuant to a decision of the Commission; and local courts, who reached conclusions on extraneous issues that competed with the Commission's findings, or disregarded the jurisdiction or previous decisions of the Commission. Observers consequently pointed out the need for the training of lawyers and judicial and law enforcement personnel, as well as the importance of establishing credible guarantees of independence from pressures and intimidations that could be exerted by clan members and ethnic communities.[18]

D. Conclusion

In contexts where national judicial systems lack capacity and are still weakened by conflict, ad hoc quasi-judicial mechanisms appear to be an appropriate — if not necessary — solution to deal impartially with an influx of claims related to conflict and provide individuals with access to certain forms of reparation. One of the lessons learned from the experiences of the Commission for Bosnia and Herzegovina and the Commission for Kosovo is that a holistic approach is necessary to ensure an efficient reparation process. Efforts must be made from the outset to ensure coordination with enforcement bodies and other national authorities; develop appropriate national legal frameworks; and enhance the capacity of the judicial and law enforcement systems.

More fundamentally, it is crucial to keep in mind that, as efficient as they can be, ad hoc reparation mechanisms only cover specific aspects of transitional justice processes, and must therefore be conceived as one part of a global response aiming at bringing justice to those who suffered harm and losses in situations of armed conflict. Respect for the victims of such conflict also implies a proper judicial process recognizing their right and determining responsibilities, as well as a strong political will to achieve reconciliation and durable solutions for displaced persons.

Non-Security Council practice
Fatou Bensouda, Deputy Prosecutor of the International Criminal Court

Thank you for being here today, and thank you to the organizers for giving me the opportunity to tackle such an important topic: the right to reparations.

Victims are of course the first and the most important beneficiaries of the work of the Office of the Prosecutor and the International Criminal Court in general.

The framework of victims' participation established in the Rome Statute represents a key innovative feature of this Court and is, in the Prosecution's view, a milestone in international criminal justice. It is part of a consistent pattern of evolution of international law, including but not limited to international criminal law, which recognizes victims as actors and not only passive subjects of the law, and grants them specific rights.

However, this is not the only key evolution. One of the unique features of the Rome Statute system is the full system of reparations envisioned in the Statute, including through the Trust Fund for Victims. Such a global scheme is important. Victims need to receive individual or collective reparations to ensure the full cycle

[18] Edward Tawil, "Property rights in Kosovo: a haunting legacy of a society in transition", International Center for Transitional Justice, Occasional Paper (February 2009); and OSCE, Department of Human Rights and Communities, Legal System Monitoring Section, "Conflicting jurisdiction in property disputes, monthly report, April 2009".

of justice. As not all victims will participate, the role for the trust fund as a tool able to reach any victim is key.

In fact the Trust Fund was established by the Rome Statute as the embodiment of the States parties' commitment to the system's function of restorative justice, supporting those activities which address the harm resulting from the crimes under the jurisdiction of the Court. Positive and proactive engagement with victims can have a significant effect on how they experience and perceive justice, and it can contribute to their healing process.

For the reparations stage, the Office of the Prosecutor favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution. Any other approach would be overly restrictive and unfair, since the Prosecution must necessarily limit the incidents selected in its investigation and prosecution. Accordingly, the Office will support reparations applications, as appropriate, by a broader range of individuals and entities than those who are linked to the charges for which the accused is ultimately convicted. Modalities will need to be further developed consistent with the general broad scheme of reparations as envisioned in the Statute.

Article 75 of the Statute provides that the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The Court may order money and other property collected through fines or forfeiture from a convicted person to be transferred to the Trust Fund for the implementation of reparation awards. However, the Trust Fund has also been established to complement such resources through voluntary contributions from donors.

The Court may also grant collective reparation awards to victims or to grant reparation awards to an intergovernmental, international or national organization through the Trust Fund for Victims. In addition, article 75 (3) provides that before making a reparation order, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. It may hold a separate hearing for this purpose. Finally, the Trust Fund may directly make use of its resources for the benefit of victims more generally, thus allowing a wide range of individuals to benefit from such awards.

In this context, it is part of the Office's Prosecutorial strategy for 2009-2012 and one of the Office's priorities to conduct financial investigations in order, inter alia, to potentially contribute to the reparations phase.

The ICC system is anticipating the possible commencement of the first reparations proceedings some time early in 2012 pending the verdicts issued by the Trial Chambers and potential Court-ordered reparations awards against a convicted person.

However, the Office believes that we should not wait for the end of the judicial proceedings at the Court for victims of the crimes being prosecuted to receive assistance. Victims should be integrated into development, health or education programmes developed by actors in the field. The Office has consistently advocated for this broad approach with relevant State and intergovernmental partners. In this sense, the Court is only one part of the global system of justice and reparations

established in the Rome Statute. On the basis of complementarity, national reparative schemes also have a crucial role to play.

Some States are leading in this area. The President of Colombia, Juan Manuel Santos, at the ninth assembly of States parties stated the following:

> Colombia wants to share this experience with the States parties to the Rome Statute. The Colombian model of transitional justice is a laboratory of experiences that can serve as an example for similar efforts in other regions. Within the framework of the South-South cooperation encouraged by the International Criminal Court, we will begin to cooperate with the Commission for Reparation and Reconciliation in Kenya.

The Office has welcomed these exchanges of expertise and best practices in the area of victims' reparations and has encouraged other States to continue in this path.

The process of justice and accountability that the Court has put in place will soon reach the reparations phase. It will be a judicial process, and the judges will decide how this system should function. Naturally, many actors are now focused on the upcoming months, and expectations are high.

However, it would be wrong to think of it as the only form of reparations possible, or as the end of the road. National reparative schemes have a crucial role to play. A broad approach to reparations applications should be envisaged. And we should not wait for the end of a judicial proceeding to start assisting the victims of the crimes being prosecuted. I also invite you to think of the milestone of victims' participation in the Court's proceedings as another form of reparation, as telling their stories in the courtroom and seeing justice being done also contributes to their healing process.

All these elements should be thought of, and I invite you all to reflect further on this.